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LAW OF PERSONAL PROPERTY,

INTENDED FOR

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BY

JOSHUA WILLIAMS, ESQ.,

OF LINCOLN'S INN, ONE OF HER MAJESTY'S COUNSEL.

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TO THE EIGHTH EDITION.

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PREFACE

TO THE FIRST EDITION.

The following pages are intended as supplementary to the author's "Principles of the Law of Real Property." At the time when that work was written, the plan of the present treatise was not matured, and a chapter "On Personal Property and its Alienation" was inserted in that work. The contents of that chapter will be found interspersed in parts of the present volume; and should a second edition of the "Principles of the Law of Real Property" be called for, it is the author's intention to omit that chapter of his former work, and to supply its place by some further remarks on such elementary parts of the law of real property as may appear to have been but slightly touched upon before. The very favourable reception which the author's work on the law of real property has met with from the profession has encouraged him to undertake in the present work, a task, he believes,

hitherto unattempted: for it is singular that, notwithstanding the rapid growth and now enormous value of personal property in this country, no treatise has yet appeared having for its object the introduction of the student in conveyancing to that large and increasing portion of his study and practice which comprises the law relating to such property. As to real property, he may take his choice amongst three or four publications, all having the same object of facilitating his studies; but the law of personal property, though sufficiently treated of in all that relates to it as purely mercantile, has not yet had any elementary treatise on its principles, so far as they affect the practice of conveyancing. The present work is an attempt to supply this deficiency, and, in conjunction with the author's "Principles of the Law of Real Property," to afford the student a brief and simple introduction to the whole system of modern conveyancing. The novelty of the attempt has, however, increased the difficulty of the task. The author has endeavoured proportionably to increase his diligence and care. He can, however, scarcely hope to have escaped all errors. And here he would caution the student against too implicit a reliance on the dicta

of text books. Elementary books cannot from their nature be completely accurate. As helpers to more perfect knowledge, they may be most valuable. But it would be as great a mistake for a student to remain satisfied with his knowledge of a text book, as for an author to compress into an elementary work all that could possibly be said on the subject.

7, New Square, Lincoln's Inn,
23rd May, 1848.

TABLE OF CONTENTS.

INTRODUCTORY CHAPTER.

PAGE

Of the Subjects and Nature of Personal Property 1

Part I.

OF CHOSES IN POSSESSION 9

CHAP. I.

Of Chattels which descend to the Heir 9

CHAP. II.

Of Trover, Bailment and Lien 22

CHAP. III.

Of the Alienation of Choses in Possession 33

CHAP. IV.

Of Ships 58

Part II.

OF CHOSES IN ACTION..... 67

CHAP. I.

Of Actions ex delicto 67

CHAP. II.

Of Contracts 75

PAGE

CHAP. III.

Of Debts 103

CHAP. IV.

Of Bankruptcy of Traders 139

CHAP. V.

Of Bankruptcy of Non-Traders 174

CHAP. VI.

Of Insurance 183

CHAP. VII.

Of Arbitration 191

Part III.

OF INCORPOREAL PERSONAL PROPERTY 207

CHAP. I.

Of Personal Annuities, Stocks and Shares 207

CHAP. II.

Of Patents and Copyrights 245

Part IV.

OF PERSONAL ESTATE GENERALLY 270

CHAP. I.

Of Settlements of Personal Property 270

CHAP. II.

Of Joint Ownership and Joint Liability 315

CHAP. III.

Of a Will 334

PAGE

CHAP. IV.

On Intestacy 367

CHAP. V.

Of the mutual Rights of Husband and Wife 382

Part V.

OF TITLE 412

Appendix (A.) 431

Appendix (B.) 436

INDEX 449

INDEX TO CASES CITED.

A.

PAGE

Abbot *v.* Blofield 391
Abbott *v.* Rogers 225
Abergavenny, E. of, Morgan *v.* 20
Abingdon (Lord), Clarke *v.* .. 115
Acaster, Rogers *v.* 397
Accidental Death Insurance Company, Shilling *v.* .. 184
Ackerman, Ex parte 326
Acton *v.* Acton 358
—— M'Neillie *v.* 328
—— *v.* White 402
—— *v.* Woodgate 313
Adam *v.* Statham 200
——— Wilkinson *v.* 363
Adams, In re 135
——— Malkin *v.* 140
——— *v.* Paynter 304
Adcock, Ross *v.* 73
——— Walter *v.* 134
——— Wood *v.* 200
Addenbrooke, Foley *v.* .. 317
Addison *v.* Round 25
Adney, Wennall *v.* 81
Adsetts *v.* Hives 94
Aflalo, Grove *v.* 42
Agar *v.* Lisle 23
Aitcheson *v.* Cargey 200
——— Cargey *v.* 199
Aldous *v.* Cornwell 94
Alexander *v.* Alexander .. 286
——— Dover *v.* 363
Alford, Sunbolf *v.* 28
Alger *v.* Parrott 280
Allatt *v.* Carr 34
Allen *v.* Bonnett 145
—— Brown *v.* 358
—— Festing *v.* 281
—— Hobby *v.* 397
—— *v.* Smith 28
Alleyn *v.* Alleyn 359
Allwood *v.* Heywood 12
Ambergate, &c. Railway Company *v.* Noreliffe 221
Amcotts, Phelp *v.* 310

PAGE

American Leather-Cloth Company Limited, Leather-Cloth Company Limited *v.* .. 267
Ames *v.* Parkinson 210
Amicable Assurance Society *v.* Bolland 184
Amies *v.* Skillern 316
Amis, Witt *v.* 340
Amyot, Brown *v.* 275
Anchor Reversionary Company Limited, Marriott *v.* .. 63
Anderson *v.* Coxeter 201
——— Currie *v.* 40
——— *v.* Martindale .. 317
——— Petty *v.* 398
——— Price *v.* 274
——— Thomson *v.* .. 194
Andrew *v.* Andrew 273
Andrews *v.* Diggs 105
——— Kempe *v.* 318
——— *v.* Partington .. 293
——— *v.* Salt 404
——— Windle *v.* 91
Angerstein, Tidswell *v.* .. 185
Angier *v.* Stannard 307
Annandale, Brown *v.* 248
Annesley, Macleod *v.* 296
Anon., 1 Atk. 262 162
——— 1 Salk. 71 199
——— 2 Ventr. 218 53
Anstruther, Ouseley *v.* .. 210
Antrobus, Cunningham *v.* .. 394
——— *v.* Smith 35
Appleby, Pickering *v.* .. 213
Arbouin, Pritchard *v.* .. 362
Archer, Eyre *v.* 133
——— *v.* Gardiner 393
——— *v.* Kelly 309
——— *v.* Marsh 97
Armistead, De Begnis *v.* .. 94
Armory *v.* Delamirie .. 24, 25
Armstrong, Tullett *v.* .. 401, 402
Arnold, Rawsthorn *v.* .. 202
Arton, Pugh *v.* 15
Ashburner, Fletcher *v.* .. 300

	PAGE
Ashburner *v.* M'Guire	.. 358
——— Warden *v.* ..	.. 276
Ashby *v.* Ashby ..	.. 395
—— Lloyd *v.*	.. 331
—— Vere *v.*	.. 331
Ashford, Davies *v.* ..	.. 301
———, Graves *v.* ..	.. 261
Ashley *v.* Ashley ..	.. 184
Ashton *v.* Lord Langdale	361, 362
Askew, Carey *v.* ..	.. 336
——— Newton *v.* ..	.. 312
Aspinall *v.* Pickford ..	.. 29
Aston, Harvey *v.* ..	.. 383
Atcheson, Scarpellini *v.*	.. 391
Atherton, Lackington *v.*	.. 43
Atkinson, Ex parte, In re Brooksbank ..	.. 129
——— *v.* Bell ..	.. 39
——— Clapham *v.* ..	133, 135
——— *v.* Denby ..	.. 129
Atkyns *v.* Kinnier ..	76, 77, 97
Attenborough, Morley *v.*	.. 416
Att.-Gen. *v.* Bowens..	.. 349
——— *v.* Davies ..	.. 362
——— *v.* Davison ..	.. 199
——— Drake *v.* ..	.. 350
——— Glubb *v.* ..	.. 362
——— *v.* Graves ..	.. 361
——— *v.* Hertford, Marquis of ..	.. 355
——— *v.* Hope ..	.. 349
——— *v.* Malkin ..	.. 280
——— March *v.* ..	.. 361
——— *v.* Meyrick ..	.. 361
——— *v.* Tyndall ..	.. 362
Attwater *v.* Attwater ..	.. 358
Attwood *v.* Munnings	.. 415
Aubert *v.* Maze ..	.. 95
Aubin *v.* Daly ..	.. 208
Auldjo, Wallace *v.* ..	.. 393
Avery *v.* Langford ..	.. 97
—— Scott *v.*	.. 192
Axtell, Young *v.* ..	.. 327
Ayton *v.* Ayton ..	.. 365

B.

	PAGE
Badcock, Saddlers' Company *v.*	188
Badger, In re	.. 201
——— *v.* Shaw ..	.. 52
Bagley *v.* Mollard ..	.. 363
Bagnuley *v.* Hawley ..	.. 416
Bagwell *v.* Dry ..	364, 366
——— Law *v.* ..	.. 313
Bailey *v.* Edwards ..	.. 123
——— *v.* Macaulay ..	.. 333
Baily, Snellgrove *v.* ..	.. 340
Bain *v.* Lescher ..	.. 364
Bainbridge, Hedley *v.*	.. 332
Bainbrigge *v.* Blair ..	.. 305
Baine, Willing *v.* ..	.. 316
Bainton *v.* Ward ..	.. 282
Baker *v.* Bayldon ..	.. 393
—— *v.* Bradley ..	.. 402
—— *v.* Henderson ..	.. 30
—— Heslop *v.* ..	.. 56
—— Leonard *v.* ..	.. 177
—— Lyon *v.*	.. 306
—— Mosley *v.* ..	.. 242
Balch *v.* Symes ..	.. 30
Baldey *v.* Parker ..	.. 41
Baldry, Norman *v.* ..	.. 354
Baldwin, Re, Ex parte Foss	.. 266
——— Lloyd *v.* ..	.. 301
Balfour *v.* Ernest ..	.. 332
——— *v.* Welland ..	.. 301
Balguy, Broadhurst *v.*	.. 306
Ball, Caldwell *v.* ..	.. 65
—— Gambart *v.* ..	.. 261
Bamfield *v.* Tupper ..	.. 88
Bamford, Brown *v.* ..	.. 402
Bank of England, Churchill *v.*	217
——— Franklin *v.*	.. 218
——— *v.* Lunn ..	216, 217
——— *v.* Moffatt ..	.. 217
——— *v.* Parsons ..	.. 217
——— Richardson *v.*	.. 223
Banks, Bell *v.*	.. 123
——— *v.* Gibson ..	.. 268
Banner *v.* Lowe ..	.. 276
Bannister, Eicholtz *v.*..	.. 416
——— Haley *v.* ..	.. 292
——— Moodie *v.* ..	.. 419
Banwen Iron Co. *v.* Barnett ..	225
Barber *v.* Barber ..	.. 364
——— Buckley *v.* ..	.. 318
——— *v.* Fox	.. 114
——— Knight *v.* ..	213, 240
——— Mills *v.* ..	.. 89
Barchard, Savill *v.* ..	.. 29
Barclay, Ex parte ..	.. 14
——— Hidson *v.* ..	.. 135
——— *v.* Wainewright	.. 274
Bardell, Rex *v.* ..	.. 194
Barden, In the Goods of	.. 341
Barham, Moor *v.* ..	.. 375
——— Power *v.* ..	.. 416
Baring *v.* Day	.. 29
Barker *v.* Lea	.. 393
——— Price *v.* ..	.. 324
——— Re	.. 188
——— Stamper *v.* ..	.. 404
——— *v.* Stead ..	.. 333
Barlow, Errat *v.* ..	.. 292
Barnard, Earl of Glengall *v.*..	360
——— Lyde *v.* ..	89, 426

	PAGE
Barnes, Skey *v.*	290
Barnett, Brandao *v.*	29
——— Banwen Iron Co. *v.* ..	225
——— Van *v.*	301
Barr's Trusts, In re	425
Barrack *v.* M'Culloch.. ..	311
Barrett *v.* Parry	197
Barrie, Glover *v.*	200
Barrow, Lysons *v.*	347
Barrows, Hall *v.* ..	267, 268
Barry, Haly *v.*	216
—— *v.* Nesham	329
Bartholomew, Drybutter *v.* ..	219
Bartlett *v.* Bartlett	425
——— Ex parte	405
——— *v.* Gillard	359
Barton *v.* Barton	382
——— Beckton *v.*	360
——— *v.* Briscoe	402
——— *v.* Crofts	42
Barton's Will, In re	387
Bartrop, Eyre *v.*	123
Bassett, Way *v.*	325
Bastard, Nicholls *v.*	26
Bate, Hunt *v.*	78
Bateman, Brown *v.*	34
——— *v.* Davis	299
——— *v.* Ross	404
Bates *v.* Cooke	191
—— Foster *v.*	370
—— Turby *v.*	39
Bates & Redgate, Re	248
Bath, Ex parte	140
Bayldon, Baker *v.*	393
Baylis, Chowne *v.* ..	48, 414
Beal, Ex parte	263
Beale *v.* Beale	287
Bean, Lepine *v.*	364
Bear *v.* Bromley	224
Beard, Boulton *v.*	307
——— *v.* Egerton ..	249, 251
Beaufort, Duke of, Wellesley *v.*	405
Beaumont *v.* Oliveira	363
——— *v.* Reeve	81
Beavan *v.* Earl of Oxford ..	216
Beck, Newton *v.*	11
—— Ward *v.*	60
Beckett, Donaldson *v.* ..	256
Beckford, Greening *v.* ..	426
Beckham *v.* Drake ..	325, 329
Beckton *v.* Barton	360
Beddoes, Brampton *v.* ..	97
Beer *v.* Beer	275
Begbie *v.* Fenwick	xliv
Belding *v.* Read	33
Bell, Atkinson *v.*	39
—— *v.* Banks	123
—— *v.* Bidgood ..	105, 240

	PAGE
Bell, Bowlby *v.*	240
—— Hamilton *v.*	56
—— Hobson *v.*	427
—— Meux *v.*	425
—— Sanderson *v.*	28
Bellaris, Brown *v.*	311
Bellasis *v.* Ermine	383
Belton *v.* Hodges	141
Benedict, Montague *v.* ..	398
——— Seaton *v.*	398
Benham *v.* Broadhurst ..	134
Bennett *v.* Burton	178
——— Ex parte	357
——— *v.* Lytton	302
——— Page *v.*	189
Benning, Sweet *v.*	257
Bensley *v.* Bignold	95
Benson *v.* Maude	354
Bentall *v.* Burn	41
Bentley *v.* Mackay	312
Benyon *v.* Maddison	279
Berchtoldt, Countess of, Earl of Lonsdale *v.*	279
Bern, Hardy *v.*	116
Bernard, Coggs *v.*	26
Berndtson *v.* Strang	44
Bernes, Stanley *v.*	338
Berney, West *v.*	287
Berriman *v.* Peacock	18
Berrington *v.* Evans ..	109, 310
Berry, Longbottom *v.* ..	14
Best, Paull *v.*	163
Betts *v.* Burch..	76
—— *v.* Kimpton	392
—— *v.* Menzies	247
Bevan, Ex parte	326
——— *v.* Walters	28
Bewit, Whitfield *v.*	18
Biddell *v.* Leeder	96
Biddlecomb *v.* Bond	174
Bidgood, Bell *v.*	105
Bignold, Bensley *v.*	95
Bill *v.* Cureton..	312
Billingsley, Lady Shore *v.* ..	316
Bingham, Pardo *v.*	419
Binks, Harland *v.*	313
Binnington *v.* Wallis ..	79, 96
Binns, Swallow *v.*	290
Birch, Watson *v.*	418
Bird *v.* Boulter	42
—— *v.* Brown	43
—— *v.* Gammon	87
—— Morley *v.*	316, 364
—— *v.* Ralph	73
Birmingham Gas Light and Coke Co., Ex parte, Re Adams	135
Bishop *v.* Elliott	15

	PAGE
Bishopp *v.* Colebrook	397
Bissett *v.* Burgess	74
Bissell, Re	170, 172
Bittleston, Quartermaine *v.*	56
Black, Willis *v.*	310
Blackburn, Hobson *v.*	363
Blackburne, Strode *v.*	12
Blacklow *v.* Laws	400
Blades *v.* Higgs	21
Blair, Bainbrigge *v.*	305
—— *v.* Bromley	331
—— *v.* Nugent	418
Blake, Dundas *v.*	423
——— Ex parte	309
——— *v.* Izard	34
——— *v.* White	123
Blake's Patent, Re	250
Blakelock, Stevenson *v.*	29
Bland, Ex parte	141
Blantern, Collins *v.*	94
Bligh *v.* Brent	318
Blight, Loveacres *d.* Mudge *v.*	320
Blisset *v.* Cranwell	320
Blofield, Abbot *v.*	391
Bloomer *v.* Darkes	135
Blount *v.* Burrow	341
Bloxham *v.* Sanders	43, 45
——— *v.* Elsee	251
Blunden *v.* Desart	30
Blurton, Kirk *v.*	331
Blythe *v.* Granville	309
Boaler *v.* Mayor	123
Bodley *v.* Reynolds	45
Bogue *v.* Houlston	261
Boldero, Godsall *v.*	185
——— Lushington *v.*	18
Bolland, Amicable Assurance Society *v.*	184
——— *v.* Disney	184
Bollett, Barnby *v.*	416
Bond, Biddlecomb *v.*	174
—— Smith *v.*	115
Bonnett, Allen *v.*	145
Booker, Van Casteel *v.*	44
Boosey *v.* Jefferys	256
——— Jefferys *v.*	258
Booth *v.* Booth	306
——— Kirkman *v.*	328
——— Martindale *v.*	50
——— Whale *v.*	353
Boothby, Morley *v.*	84
Borman, Scarborough *v.*	401, 402
Boss *v.* Godsall	299
Botfield, Bradburne *v.*	317
Boucher, Prescott *v.*	392
Boughton, Knight *v.*	275
——— Lord St. John *v.*	418
Boulter, Bird *v.*	42

	PAGE
Boulton *v.* Beard	307
——— *v.* Bull	249
Bourne, Dowbiggin *v.*	121
——— *v.* Fosbrooke	25, 35
——— Hawken *v.*	331
Boutts *v.* Ellis	340
Bouwens, Attorney-General *v.*	349
Bowden, Jones *v.*	417
Bower, Nicholson *v.*	40
——— *v.* Marris	128
——— Mexborough *v.*	191
Boweren, Grymes *v.*	14
Bowes, Countess of Strathmore *v.*	399
Bowker, Wilmshurst *v.*	44, 45
Bowlby *v.* Bell	240
Bowles's case	19
Bowley, Reynolds *v.*	327
Bowman, Mullen *v.*	366
Bowser *v.* Cox	123
Bowsher, Davis *v.*	29
Bowyer *v.* Woodman	420
Boyd *v.* Boyd	374, xliv
—— *v.* Shorrock	52
Boydell *v.* M'Michael	16
Boyle *v.* Bishop of Peterborough	285
—— Ex parte	162
Bracebridge *v.* Cook	387
Bradburne *v.* Botfield	317
Bradley, Baker *v.*	402
——— *v.* Copley	24, 51
——— Hampshire *v.*	307
——— Perkins *v.*	48
——— Wren *v.*	403
Bradsey *v.* Clyston	197
Bradshaw, Custance *v.*	318
——— Yeoman *v.*	117
Bradyl, Burridge *v.*	359
Braithwaite *v.* Britain	325
——— *v.* Skinner	6
Bramah *v.* Roberts	332
Brampton *v.* Beddoes	97
Bramwell *v.* Eglinton	180
Brandao *v.* Barnett	29
Brander *v.* Brander	274
Brandon *v.* Robinson	401
Brathwait, Lampleigh *v.*	78
Brearey, Roundell *v.*	310
Bremridge, Evans *v.*	324
Brent, Bligh *v.*	318
Brereton, Drosier *v.*	295
Brett *v.* Greenwell	393
Briant, Philpot *v.*	123
Brice *v.* Stokes	306
Bridge *v.* Bridge	312
——— *v.* Cage	96
——— *v.* Yates	316
Bridges, Etty *v.*	426

	PAGE
Bridges *v.* Hawkesworth	25
Brierley *v.* Kendall	51
Briggs *v.* Chamberlain	397
Bright, Jones *v.*	417
Bright's trusts	424
Brinsmead *v.* Harrison	45
Briscoe, Barton *v.*	402
——— Hanchett *v.*	397
Brise, Matthews *v.*	295
Bristead *v.* Wilkins	217
Bristol and Exeter Railway Company, Coombs *v.*	41
Bristowe *v.* Wardo	286
Britain, Braithwaite *v.*	325
British Empire Shipping Company *v.* Somes	28
Broadbent, Mason *v.*	420
Broadhurst *v.* Balguy	306
——— Benham *v.*	134
Brockelbank, Stocker *v.*	329
Bromage *v.* Lloyd	90
Bromhead, Wilkins *v.*	39
Bromley, Bear *v.*	224
——— Blair *v.*	331
——— *v.* Brunton	340
Brooke *v.* Enderby	328
——— *v.* Haynes	343
——— *v.* Mitchell	24, 196, 197
Brookes, Coombes *v.*	305
Brooks *v.* Keith	310
Brookshank, Re	129
Broom *v.* Broom	318
Broughton *v.* Broughton	306
Brown *v.* Allen	358
——— *v.* Amyott	275
——— *v.* Annandale	248
——— *v.* Bamford	402
——— *v.* Bateman	34
——— *v.* Bellaris	311
——— Bird *v.*	43
——— Collins' Co. *v.*	267
——— *v.* Edgington	417
——— Jennings *v.*	81
——— *v.* Lee	122
——— Metropolitan Counties, &c. Society *v.*	14
——— *v.* Pocock	401
——— Richardson *v.*	416
——— *v.* Tanner	66
——— *v.* Vawser	206
——— Wakefield *v.*	317
——— *v.* Weatherby	325
Browne *v.* Cavendish	313
——— *v.* Hammond	365
——— Pfleger *v.*	127, 129
——— *v.* Savage	425
Brownlow, Nixon *v.*	222
Brownrigg, Bryson *v.*	341
Brownsmith, Wilson *v.*	358
Brumridge *v.* Brumridge	307
Bruning, Smith *v.*	384
Brunton, Bromley *v.*	340
Bryan *v.* Clay	74
——— Hemsworth *v.*	196
Bryans *v.* Nix	36
Bryant, Hollis *v.*	175
——— Laythoarp *v.*	86
Bryce, Cannan *v.*	95, 99
Bryson *v.* Brownrigg	341
Buchanan, Fleming *v.*	282
Buck, Sutton *v.*	26
Buckhurst's case	10
Buckingham, Earl of, *v.* Drury	385
Buckland *v.* Johnson	45
Buckley *v.* Barber	318
——— Earl of Stafford *v.*	208
——— Ex parte	331
——— *v.* Gross	25
Buckley's trust	308
Bull, Boulton *v.*	249
——— *v.* Faulkner	30
Bunn *v.* Markham	341
Burch, Betts *v.*	76
Burdiss, Carr *v.*	37
Burford, Dix *v.*	306
Burge, Heyhoe *v.*	329
Burgess, Bissett *v.*	74
——— Ransome *v.*	293
——— Tappenden *v.*	130
——— Williams *v.*	108
Burghart, Lane *v.*	85
Burke *v.* Jones	422
Burley, Gilly *v.*	274
Burn, Bentall *v.*	41
——— *v.* Burn	332
Burnby *v.* Bollett	416
Burnell, Gale *v.*	33, 51
Burnet *v.* Mann	375
Burridge *v.* Bradyl	359
Burrough *v.* Moss	391
Burrow, Blount *v.*	341
Burrowes, Stuart *v.*	346
Burton, Bennett *v.*	178
——— Goode *v.*	11
——— *v.* Hughes	27
Bury, Petric *v.*	315
Bush, Hart *v.*	41
——— *v.* Shipman	129
Bushell *v.* Wheeler	40
Busk *v.* Davis	39
——— *v.* Fearon	190
——— Pickering *v.*	415
Butcher *v.* Butcher	310
——— *v.* Jackson	288
Butler, Falkner *v.*	286
Butlin, Hawtrey *v.*	xliv

	PAGE
Butterfield, In re	328
Byers, Wilkinson *v.*	127
Byng *v.* Lord Strafford	279
Byrne, Ward *v.*	97
Byron *v.* Byron	83
Bywater, Wrightson *v.*	200

C.

Cadogan *v.* Earl of Essex	299
Cage, Bridge *v.*	96
Caldwell *v.* Ball	65
Calvert *v.* London Dock Company	123
Camm, Goulder *v.*	402
Campbell *v.* Campbell	306
——— *v.* Home	288
——— Macarthur *v.*	202
Campion *v.* Cotton	79
Candish, Wilkinson *v.*	140
Cannan *v.* Bryce	95, 99
Cannings *v.* Flower	292
Cannington *v.* Nuttall	252
Careless, Rachfield *v.*	366
Carew, Clive *v.*	402
Carey *v.* Askew	336
—— Collins *v.*	305
Cargey *v.* Aitcheson	199
——— Aitcheson *v.*	200
Carlisle, Earl of, Lechmere *v.*	301
Carlon, Clack *v.*	306
Carpenter *v.* Smith	247
——— Tebbs *v.*	210
Carr, Allatt *v.*	34
—— *v.* Burdiss	37
Carrick, Freshney *v.*	51
Carrington, Ex parte	140
Carruthers, Parkin *v.*	327
Carstairs, Ex parte	123
——— Maltby *v.*	123
Carter *v.* Crick	416
——— *v.* Taggart	275, 394
——— *v.* Whalley	328
Cartwright *v.* Cartwright	403
——— *v.* Vawdry	363
Carver, Waugh *v.*	329, 331
Case, Hartley *v.*	92
—— South Carolina Bank *v.*	331
Cassell, In re	204
——— *v.* Stiff	264
Castle *v.* Sworder	41
Castrique, Ilderton *v.*	134
Catchpole, Cook *v.*	192
Caulfield *v.* Maguire	121
Cautley, Foster *v.*	285
Cave *v.* Cave	16
—— Farquharson *v.*	341
—— *v.* Roberts	377

	PAGE
Cavendish, Browne *v.*	313
Chadwick *v.* Doleman	286
Chaloner, Horsley *v.*	355
Chamberlain, Briggs *v.*	397
——— *v.* Williamson	71
Chambers, Willet *v.*	331
Champernown *v.* Scott	30
Champneys, Sturgis *v.*	392
Chandler, Kensington *v.*	311
Channon *v.* Patch	18
Chanter *v.* Hopkins	416
Chaplin, Ex parte	295
——— *v.* Rogers	35
Chapman, Howse *v.*	361
——— May *v.*	92
——— *v.* Milvain	223
Charlesworth, Malcolm *v.*	394
Chase, Goodman *v.*	85
Cherry *v.* Heming	86
Cheslyn *v.* Dalby	87
Chesterfield and Midland Silkstone Colliery Co. Limited *v.* Hawkins	134
Cheyne, Eccles *v.*	365
Chichester, Coventry *v.*	360
——— Smith *v.*	30
Chidell *v.* Galsworthy	34
Child *v.* Morley	213
Children, Paul *v.*	363
Chiswell, Gray *v.*	325
Chitty, Hulme *v.*	404
Chollett *v.* Hoffman	256
Cholmeley *v.* Paxton	19
Chowne *v.* Baylis	48, 414
Churchill *v.* Bank of England	217
——— *v.* Small	12
Churchward *v.* Studdy	21
Churton *v.* Douglas	268
City of London Steam Packet Company, Fenton *v.*	65
Clack *v.* Carlon	306
Clancy *v.* Piggott	84
Clapham *v.* Atkinson	133, 135
Clare, Ridgway *v.*	325
Claridge, Hollis *v.*	31
Clarke *v.* Abingdon, Lord	115
—— Groves *v.*	393
—— Hopkins *v.*	180
—— In re	331
—— *v.* Parker	383
—— Rawlinson *v.*	329
—— *v.* Seton	115
—— *v.* Shee	412
—— Smith *v.*	91
—— *v.* Williams	133
Clarkson, Wild *v.*	115
Clay, Bryan *v.*	74
Clayton *v.* Kynaston	321, 324

	PAGE
Cleave *v.* Jones	88
Clegg *v.* Clegg	310
—— *v.* Rowland	355
Clift *v.* Schwabe	184
Climie *v.* Wood	14
Clinton's Trust, In re	xliv
Clive *v.* Carew	402
Close *v.* Close	123
—— *v.* Waterhouse	29
Clough *v.* French	112
——— *v.* Lambert	404
Clulow, In re	275
Clyston, Bradson *v.*	197
Cobb, Rishton *v.*	382
Cock, Lashbrook *v.*	320
Cockburn, Daubney *v.*	288
——— Ex parte	134
——— *v.* Peel	297
Cocksedge *v.* Cocksedge	403
Codrington *v.* Lindsay	409
Coggs *v.* Bernard	26
Coker, Hitchcock *v.*	97
Colbeck, In re	329
Cole, Kearsley *v.*	324
—— Kerrison *v.*	96
—— Mouflet *v.*	97
Colebrook, Bishopp *v.*	397
Colegrave *v.* Dias Santos	14
Coles *v.* Turner	134
Collectors of Customs, Rex *v.*	318
Collett, Meryon *v.*	280
——— *v.* Morrison	185
Collins *v.* Blantern	94
——— *v.* Carey	305
——— *v.* Collins	204
——— Drew *v.*	135
——— Hobby *v.*	397
——— *v.* Lamport	63
——— Lowndes *v.*	120
——— *v.* Martin	92
Collins Company *v.* Brown	267
Collinson, Holderness *v.*	29
Colvin, Wilton *v.*	309
Combe, Ward *v.*	274
Compton, Peter *v.*	85
——— Right *d.* Compton *v.*	383
Comptoir d'Escompte de Paris, Roger *v.*	44
Conduitt *v.* Soane	273
Congreve, Douglas *v.*	310
——— *v.* Evetts	34
Conquest, Marsh *v.*	258
Cook, Bracebridge *v.*	387
—— *v.* Catchpole	192
—— *v.* Wright	79
Cooke, Bates *v.*	191
——— *v.* Cooke	191
——— *v.* Fuller	407

	PAGE
Cooke *v.* Whorwood	200
Cookson *v.* Cookson	318
——— *v.* Reay	301
Coombes *v.* Brookes	305
Coombs *v.* Bristol and Exeter Railway Company	41
——— *v.* Coombs	369
Coope *v.* Cresswell	419
——— *v.* Twyman	122
Cooper, Davidson *v.*	94
——— Edwards *v.*	311
——— Haymes *v.*	31
——— *v.* Johnson	196
——— Loveridge *v.*	424, 426
——— *v.* Shepherd	45
——— *v.* Willomatt	27
——— *v.* Woolfit	17
Cope *v.* Rowlands	95
Copeland, Morton *v.*	258
Copis *v.* Middleton	121
Copley, Bradley *v.*	24, 51
Coppin, Dillon *v.*	35, 80
Corbet, Ewer *v.*	352
Cordell, Elliott *v.*	394
Corles, Dipple *v.*	78
Cornforth *v.* Smithard	82
Cornthwaite *v.* Frith	313
Cornwallis, Lassells *v.*	282
Cornwell, Aldous *v.*	94
Corporation of Liverpool, Scott *v.*	192
Corrance *v.* Corrance	409
Cotton, Campion *v.*	79
Courtauld *v.* Legh	201
Couston, In re	xliv
Coventry *v.* Chichester	360
——— *v.* Coventry	304, 310
——— Lord, Lygon *v.*	294
Coverdale *v.* Eastwood	79
Cowell *v.* Simpson	29, 31
Cowley, Earl, *v.* Wellesley	18
Cox, Bowser *v.*	123
Coxeter, Anderson *v.*	201
Craddock, Lake *v.*	318
Cradock *v.* Piper	306
Craig, Downes *v.*	72
Crallan *v.* Oulton	422
Cramer *v.* Moore	310
Cranefeld, Freake *v.*	422
Cranley *v.* Hillary	129
Cranmer's case	359
Cranwell, Blisset *v.*	320
Craven, Ex parte	162
Craythorne *v.* Swinburne	122
Creed *v.* Perry	397
Cresswell, Coope *v.*	419
——— Green *v.*	85
Cresswick *v.* Woodhead	344

	PAGE
Crick, Carter *v.*	416
Cripps *v.* Hartnell	85
Cristall, Ferguson *v.* ..	24, 27
Crofton *v.* Poole	166
Crofts, Barton *v.*	42
——— Elves *v.*	97
Crombe, Martin *v.*	318
Crook *v.* Hill	363
Cross, Re	215
Crosskey, European, &c. Shipping Co. *v.*	204
Crossley *v.* Dobson	322
Crow *v.* Robinson	216
Croxton *v.* May	393
Croydon Canal Co., Hodges *v.*	420
Cruger *v.* Dunlop	135
Cruise *v.* Hunter	405
Cruttwell *v.* Lye	268
Cubitt, Stansfeld *v.*	52
Cubley, Pigot *v.* ..	26, 27
Cullingworth *v.* Lloyd ..	129
Cullwick *v.* Swindell	14
Cumber *v.* Wane	127
Cunningham *v.* Antrobus ..	394
Cunynghame *v.* Thurlow ..	288
Cureton, Bill *v.*	312
Curling *v.* Flight	428
Currey, Wilmer *v.*	322
Currie *v.* Anderson	40
Cusack *v.* Robinson	40
Custance *v.* Bradshaw ..	318
Cutbush *v.* Cutbush	328
Cutfield, Wardroper *v.* ..	275
Cuthbert *v.* Dobbin	107
Cutler, In re	392
Cutten *v.* Sanger	311

D.

	PAGE
Dabbs, Ford *v.*	175
Dalby, Cheslyn *v.*	87
—— *v.* India and London Life Assurance Company ..	185
Dale, Drayton *v.*	166
Dalton, In re	384
Daly, Aubin *v.*	208
Dalzell, Lynch *v.*	188
Danby, Trimmer *v.*	275
Daniel, Hunter *v.*	98
——— Kirwan *v.*	313
Daniell *v.* Dudley	280
Darby *v.* Darby	318
Darell, Hales *v.*	359
Darkes, Bloomer *v.*	135
Darlington District Joint Stock Banking Company, Ex parte	331
Darrell, Sturgis *v.*	422
Dartmouth, Lord, Howe *v.* ..	210
Darton, Moore *v.*	340
Daubeny *v.* Cockburn.. ..	288
Davenport, Elliott *v.* ..	279, 364
——— Ex parte	36
Davids, Jones *v.*	121
Davidson *v.* Cooper	94
——— Ex parte	259
Davies *v.* Ashford	301
——— Attorney-General *v.* ..	362
——— *v.* Humphreys ..	122
——— *v.* Penton	76
——— *v.* Stainbank	123
——— *v.* Vernon ..	10, 12, 30
Davis, Bateman *v.*	299
—— *v.* Bowsher	29
—— Busk *v.*	39
—— *v.* Earl of Dysart ..	12
—— Godfrey *v.*	363
—— *v.* Mason	97
—— Shepley *v.*	39
Davison, Attorney-General *v.*	199
Daw *v.* Eley	250
Dawes *v.* Peck.. ..	41, 44
Dawson *v.* Kearton	81
——— Pearson *v.* ..	36, 41
Day, Baring *v.*	29
—— Hulkes *v.*	216
—— Wallis *v.*..	97
Deakle, Payne *v.*	197
Dean *v.* Hogg	65
Dearle *v.* Hall	424, 426
De Begnis *v.* Armistead ..	94
De Castro, Willis *v.*	324
Dedire, Freemoult *v.*	310
Deeks *v.* Strutt	6
Deering *v.* Earl of Winchelsea	122
De la Crouée, Hambidge *v.* ..	332
De la Garde *v.* Lempriere ..	393
Delamirie, Armory *v.*..	24, 25
De Mattos, De Pothonier *v.* ..	124
De Mautort *v.* Saunders ..	325
Denby, Atkinson *v.*	129
Denny, Flory *v.*	38
De Pass, Lyons *v.*	413
De Pothonier *v.* De Mattos ..	124
De Proven, Duplex *v.* ..	109
Desanges, Thomas *v.*	157
Desart, Blunden *v.*	30
Desbrisay, Fearon *v.*	288
Detastet, Ex parte	326
Devaux *v.* Steinkeller.. ..	89
Devaynes *v.* Noble ..	128, 325
Devereux *v.* Kilkenny, &c. Railway Company	221
Dewdney, Ex parte	422
Dewhirst *v.* Jones	133
——— *v.* Kershaw	134
D'Eyncourt *v.* Gregory ..	15
Dias Santos, Colegrave *v.* ..	14

PAGE

Dickie, Gibson *v.* 79
Dickinson *v.* Kitchen 63
——— Orr *v.* 64
——— *v.* Teesdale 423
——— *v.* Valpy 332
Diggs, Andrews *v.* 105
Dillon *v.* Coppin .. 35, 80
Dimsdale *v.* Robertson .. 198
Dipple *v.* Corles 78
Disney, Bolland *v.* 184
Dix *v.* Burford 306
Dixie, Wood *v.* 54
Dixon, Fisher *v.* 16
——— *v.* Yates .. 36, 43, 44
Dobbin, Cuthbert *v.* 107
Dobree, Ruddell *v.* 341
Dobson, Crossley *v.* 322
Dodd, Lewen *v.* 320
Doe *d.* Esdaile *v.* Mitchell .. 157
—— *d.* Morrison *v.* Glover .. 242
—— *d.* Stace *v.* Wheeler .. 343
Doleman, Chadwick *v.* .. 286
Dolland, Kensington *v.* .. 400
Dominy, Thompson *v.* .. 65
Donaldson *v.* Beckett 256
——— *v.* Donaldson .. 312
Doncaster *v.* Doncaster .. 278
Donellan *v.* Reid 86
Doran *v.* Wiltshire 301
Dorrien, Lucas *v.* 36
Dorrill, Routledge *v.* .. 287, 289
Douglas, Churton *v.* 268
——— *v.* Congreve 310
——— *v.* Douglas 338
——— Mackay *v.* 311
——— *v.* Russell 65
Dover *v.* Alexander 363
Dowbiggen *v.* Bourne 121
Dowding, Fussell *v.* 409
Dowling, Wade *v.* 199
Downes *v.* Craig 72
——— *v.* Jennings 399
Downman, Motley *v.* 267
Downs, England *v.* 399
Dowson, Pickering *v.* 416
Drake *v.* Attorney-General .. 350
—— Beckham *v.* .. 325, 329
Drayton *v.* Dale 166
Drew *v.* Collins 135
Driver *v.* Mawdesley 313
——— *v.* Scott 307
Drosier *v.* Brereton 295
Drummond, Evans *v.* .. 328
——— M'Leod *v.* .. 353
——— *v.* Parish .. 336
Drury, Earl of Buckingham *v.* 385
——— *v.* Scott 310
Dry, Bagwell *v.* .. 364, 366

PAGE

Drybutter *v.* Bartholomew .. 219
Dubost, Ex parte 35
——— Morell *v.* 106
Dudley, Daniel *v.* 280
——— *v.* Warde 16
Dufaur, Ex parte 140
Duff *v.* East India Company .. 331
—— Gordon *v.* 357
Duffield *v.* Elwes 340
Duffy's trust, In re 394
Duignan, Ex parte, In re Bissell, 170, 172
Duke, Samuel *v.* 413
—— Sheppard *v.* 418
Duncan *v.* Topham 87
Dundas *v.* Blake 423
——— *v.* Dutens 215
Dungannon, Lord, Ker *v.* .. 272
Dunkley *v.* Dunkley 393
Dunlop, Cruger *v.* 135
——— *v.* Higgins 87
Dunnicliff *v.* Mallet 320
Duplex *v.* De Proven 109
Durant, James *v.* 309
——— *v.* Prestwood 375
Durnford *v.* Lane 384
Dutens, Dundas *v.* 215
Dutton *v.* Morrison 130
Dyke *v.* Walford 368
Dykes, Tolson *v.* 180
Dysart, Earl of, Davis *v.* .. 12

E.

Eads *v.* Williams 199
Eardley *v.* Owen 310
Earle, Heinekey *v.* 44
—— *v.* Hopwood 101
—— Mare *v.* 129
East India Co., Duff *v.* .. 331
——————— Murray *v.* .. 421
——————— Venables *v.* .. 344
Eastern Counties Railway Co. *v.* Eastern Union Railway Co. 200
Easton *v.* London 12
Eastwood, Coverdale *v.* .. 79
——— *v.* Kenyon .. 78, 81
Eccles *v.* Cheyne 365
Ede, Mitchell *v.* 36
Edelston *v.* Vick 267
Edgeberry *v.* Stephens .. 249
Edgington, Brown *v.* 417
Edmonds, Goodtitle *d.* Richards *v.* 279
——— *v.* Low 359
Edmund *v.* Waugh 420
Edsun, Smarte *v.* 323

	PAGE
Edwards, Bailey *v.*	123
——— *v.* Cooper	311
——— *v.* Freeman	371
——— *v.* Hall	361
——— *v.* Harben	50
——— *v.* Janes	88
——— *v.* Jones 35, 312,	341
——— *v.* Countess of Warwick	276
Egerton, Beard *v.* .. 249,	251
Eglinton, Bramwell *v.* ..	180
Eicholtz *v.* Bannister	416
Eley, Daw *v.*	250
Elibank, Lady, *v.* Montolieu ..	393
——— Lord, Murray *v.* 393,	394
Elliot *v.* Merriman	352
Elliott, Bishop *v.*	15
——— *v.* Cordell	394
——— *v.* Davenport .. 279,	364
——— *v.* Royal Exchange Assurance Co.	192
Ellis, Boutts *v.*..	340
—— *v.* Nimmo	80
Ellison *v.* Ellison .. 35,	312
——— *v.* Elwin .. 384,	395
——— Lyddon *v.*	287
Elsee, Bloxam *v.*	251
Elton, Ex parte	326
Elves *v.* Crofts	97
Elvy *v.* Norwood	420
Elwes, Duffield *v.*	340
—— Forrest *v.* .. 210,	307
—— *v.* Maw	15
Elwin, Ellison *v.* .. 384,	395
Enderby, Brooke *v.*	328
England *v.* Downes	399
——— In re	135
——— King *v.*	32
Ennis, Sutton *v.*	275
Equitable Reversionary Interest Society *v.* Fuller ..	298
Ermine, Bellasis *v.*	383
Ernest, Balfour *v.*	332
Errat *v.* Barlow	292
Erskine's trust	393
Espinasse, Petre *v.*	312
Essex, Earl of, Cadogan *v.* ..	299
Ettricke *v.* Ettricke	320
Etty *v.* Bridges	426
European Co. *v.* Royal Mail Co.	63
European, &c. Shipping Co. *v.* Crosskey	204
Evans, Berrington *v.* .. 109,	310
—— *v.* Bremridge	324
—— *v.* Drummond	328
—— Field *v.*	402
—— *v.* Hallam	160

	PAGE
Evans, Legg *v.* .. 24, 31,	51
—— *v.* Prosser	383
—— *v.* Scott	291
—— Wilkinson *v.*	42
—— *v.* Williams	109
—— Williams *v.*	14
Everard *v.* Poppleton ..	107
Everett, Eyre *v.*	123
Evetts, Congreve *v.*	34
Ewer *v.* Corbett	352
Eyre *v.* Archer	133
—— *v.* Bartrop	123
—— *v.* Everett	123
—— Holland *v.*	87
Eyres *v.* Faulkland	272
Eyton, Pott *v.*..	329

F.

	PAGE
Falkner *v.* Butler	286
Farebrother *v.* Simmons ..	42
Farina *v.* Horne	41
Farmer *v.* Smith	242
——— Sparrow *v.*	242
Farnell, Kiddill *v.*	415
Farquhar, M'Queen *v.* ..	288
Farquharson *v.* Cave	341
Farr, Meredith *v.*	363
Farrant *v.* Thompson ..	16
Farren, Kemble *v.*	76
Faulder, Harper *v.*	12
Faulkland, Eyres *v.*	272
Faulkner, Bull *v.*	30
Fearnhead, Knatchbull *v.* ..	354
Fearon, Busk *v.*	190
——— *v.* Desbrisay	288
Fenton *v.* City of London Steam Packet Company..	65
——— Trueman *v.*	81
Fenwick, Begbie *v.*	xliv
——— *v.* Greenwell ..	307
Ferguson *v.* Cristall .. 24,	27
——— Sainter *v.*	76
Fergusson *v.* Norman	95
Fernie, Hodgkinson *v.* ..	201
——— Young *v.*	247
Fesenmeyer, Johnson *v.* ..	141
Festing *v.* Allen	281
Fetherstone *v.* Hutchinson ..	96
Fettiplace *v.* Gorges	400
Fidgeon, Laing *v.*	417
Field *v.* Evans	402
—— Northey *v.*	44
—— Yea *v.*	10
Fielder, Proudley *v.*	400
Fielding *v.* Lee	56
Finney, Foden *v.*	292
Firmin *v.* Pulham	306

PAGE

Fisher *v.* Dixon 16
—— *v.* Pimbley 200
Fitch *v.* Sutton 127
Fitzer *v.* Fitzer 404
Fleming *v.* Buchanan .. 282
———— *v.* Self 242
Fletcher *v.* Ashburner .. 300
——— *v.* Fletcher 404
——— Lechmere *v.* 87
——— Young *v.* 141
Flight, Curling *v.* 428
Flintoff, Horner *v.* 76
Flory *v.* Denny 38
Flower, Cannings *v.* 292
Foden *v.* Finney 392
Foley *v.* Addenbrooke .. 317
—— Paget *v.* 420
Foljambe, Ogilvie *v.* 86
———— *v.* Willoughby .. 294
Fooks, Pride *v.* .. 210, 307
Foote, Woods *v.* 134
Ford *v.* Dabbs 175
—— *v.* Jones 204
—— *v.* Peering 12
Fordham *v.* Wallis 88
Fordwich (Mayor of), Tomlin *v.* 200
Fores *v.* Johnes 96
Forrest *v.* Elwes .. 210, 307
Fosbrooke, Bourne *v.* .. 25, 35
Foss, Ex parte, Re Baldwin .. 266
Foster *v.* Bates 370
——— *v.* Cautley 285
——— *v.* Pearson 412
——— *v.* Weston 120
Fourdrin *v.* Gowdey 359
Fowler *v.* Fowler 359
——— Marshall *v.* 393
——— Wishart *v.* 129
Fox, Barber *v.* 114
—— Freakley *v.* 343
—— *v.* Smith 200
—— Webb *v.* 166
Francis *v.* Grover 420
——— *v.* Hawkesley 82
——— Viner *v.* 364
Franklin *v.* Bank of England 218
——— *v.* Hosier 28
——— *v.* Neate 26
Franks, Ex parte 140
Fraser, In the Goods of .. 372
——— Mather *v.* .. 14, 52
——— *v.* Palmer 305
——— *v.* Witt 44
Freake *v.* Cranefeldt 422, 423
Freakley *v.* Fox 343
Frecker, Norton *v.* 422
Freeland *v.* Pearson 365
Freeman, Ex parte 327

PAGE

Freeman, Edwards *v.* 371
Freemoult *v.* Dedire 310
French, Clough *v.* 112
——— Ex parte 296
Frere, Thomason *v.* 319
Freshney *v.* Carrick 51
Friar, Grey *v.* 116
Frith, Cornthwaite *v.* 313
Frost, Williams *v.* 246
Frowd, Moore *v.* 305
Fry, Ex parte 327
Fryatt, Reid *v.* 198
Fuller, Cooke *v.* 407
——— Equitable Reversionary Interest Society *v.* 298
Furniss *v.* Leicester 416
Fussell *v.* Dowding 409

G.

Gaffee, In re 402
Gale *v.* Burnell .. 33, 51
—— Griffiths *v.* 365
—— *v.* Walsh 91
Galsworthy, Chidell *v.* .. 34
———— *v.* Strutt 76
Gambart *v.* Ball 261
——— *v.* Sumner 261
Gammon, Bird *v.* 87
Gardiner, Archer *v.* 393
Gardner *v.* Marshall 393
Gardom, Ex parte 331
Garland, Ex parte 328
Garner *v.* Hannyngton .. 12
Garnet, Pierson *v.* 287
Garrard *v.* Lord Lauderdale .. 313
Garrod *v.* Simpson 133
Gaskell *v.* King 96
Gaters *v.* Madeley 391
Gatty, Phillipson *v.* 295
Gayler, Howell *v.* 280
Gaze, Love *v.* 366
Gee *v.* Gurney 288
Geldard, Robinson *v.* 363
Gent *v.* Harris 393
Gery, Humfrey *v.* 420
Gibbeson, Greenham *v.* .. 299
Gibbon, Kempe *v.* 419
Gibbons *v.* North-Eastern Metropolitan Asylum District .. 87
Gibbs, Lindsay *v.* 65
Gibson, Banks *v.* 268
——— *v.* Dickie 79
——— Gresty *v.* 134
Gifford, Ex parte 122, 123, 324
——— Nugent *v.* 352
Gilbert *v.* Lewis 400

PAGE

Gilbert, Richardson *v.* .. 257
Giles, Walker *v.* 243
Gilkes *v.* Leonino 87
Gill, In the Goods of 369
—— *v.* Shelley 363
Gillard, Bartlett *v.* 359
Gilly *v.* Burley 274
Giraud, Hilton *v.* 361
Girdlestone, Watts *v.* .. 210, 307
Glaysher, Ex parte 194
Gleaves *v.* Paine 392
Glendinning, Ex parte .. 129
Glengall, Earl of, *v.* Barnard 360
Gloucester, Corporation of, Trye *v.* 362
Glover *v.* Barrie 200
——— Doe *d.* Morrison *v.* .. 243
——— Morrison *v.* 242
Glubb *v.* Attorney-General .. 362
Glynn, Morris *v.* 361
——— *v.* Thorpe 112
Goddard, Pedley *v.* 202
——— *v.* Snow 399
Godden, Ex parte .. 134, 135
Godfrey *v.* Davis 363
——— *v.* Turnbull 328
Godsall *v.* Boldero 185
——— Boss *v.* 299
Goldsmid *v.* Goldsmid .. 287
Gomley *v.* Wood 305
Gomme, Hill *v.* 354
Goode *v.* Burton 11
Goodman *v.* Chase 85
——— *v.* Harvey 412
Goodtitle *d.* Richards *v.* Edmonds 279
Gordon *v.* Duff 357
——— *v.* Gordon 363
——— *v.* Harper .. 24, 27
——— Norcott *v.* 359
Gorges, Fettiplace *v.* 400
Gould, Weldon *v.* 29
Goulder *v.* Camm 402
Gowdey, Fourdrin *v.* 359
Grace *v.* Smith 329
—— Webb *v.* 383
Grafftey *v.* Humpage .. 280, 309
Graham *v.* Graham .. 359, 409
——— *v.* Londonderry 387, 388
——— Soloman *v.* 48
Grane, White *v.* 294
Grant *v.* Grant 115
—— Routledge *v.* 87
—— *v.* Vaughan 412
Grantham *v.* Hawley 33
Granville, Blyth *v.* 309
Graves *v.* Ashford 261
——— Attorney-General *v.* .. 361

PAGE

Graves *v.* Weld 17
Graves' case 263
Gray *v.* Chiswell 325
—— Hind *v.* 97
—— Irving *v.* 135
—— *v.* Limerick, Earl of .. 286
—— *v.* Mathias 95
Great Northern Railway Company Harwood *v.* .. 247
——— Pym *v.* 69
Great Western Railway Company, Rouch *v.* 157
Greaves *v.* Hepke 36
——— Shuttleworth *v.* .. 357
——— Steward *v.* 223
Greedy *v.* Lavender 396
Green *v.* Cresswell 85
—— Hardey *v.* 310
—— In re 355
—— Mathers *v.* 320
—— Price *v.* 76
—— *v.* Price 96, 97
Green's Patent 256
Greenberg *v.* Ward 134
Greenham *v.* Gibbeson .. 299
Greenhill, Rex *v.* 405
Greening *v.* Beckford .. 426
Greenwell, Brett *v.* 393
——— Fenwick *v.* 307
——— *v.* Greenwell .. 292
Greenwood's case 226
Greese, Richardson *v.* 360
Gresham, Wiles *v.* 299
Gresty *v.* Gibson 134
Gregory, D'Eyncourt *v.* .. 15
——— Heckscher *v.* 213
Grey *v.* Friar 116
—— *v.* Stuart 310
Griffin, Bishop of Hereford *v.* 257
——— Lee *v.* 42
——— Thompson *v.* 293
Griffith *v.* Ricketts .. 300, 313
Griffiths *v.* Gale 365
Grimes *v.* Harrison 243
Gross, Buckley *v.* 25
Grote, Limbard *v.* 287
Grove *v.* Aflalo 42
Grover, Francis *v.* 420
——— Whittingstall *v.* .. 325
Groves *v.* Clarke 393
——— *v.* Perkins 393
Grymes *v.* Boweren 14
——— Stratton *v.* 383
Guedalla, Montefiore *v.* .. 360
Gunn, Powle *v.* .. 78, 213
Gurney, Gee *v.* 288
Guthrie, Hewison *v.* 32
——— Leslie *v.* 65

PAGE

Gutteridge, Simmons *v.* .. 343
Guy, Styles *v.* 306

H.

H. *v.* W. 403
Hacon, Wills *v.* 133
Haddan, Mason *v.* 192
Hadfield, Rushforth *v.* .. 29
Haigh, Howdon *v.* 129
Hale *v.* Saloon Omnibus Company 54
Hales *v.* Darell.. 359
Halesham *v.* Young 331
Haley *v.* Bannister 292
Halford *v.* Kymer 185
Hall *v.* Barrows .. 267, 268
—— Dearle *v.* 424, 426
—— Edwards *v.* 361
—— *v.* Hall 312
—— *v.* Hardy 205
—— Heath *v.* 124
—— *v.* Hewer 287
—— *v.* Hugonin 397
—— *v.* Lawrence 205
—— Moss *v.* 123
—— *v.* Norfolk Estuary Company 221
—— *v.* Palmer.. 95
—— Pinkney *v.* 331
—— *v.* Potter 383
—— Reynolds *v.* 56
—— Stanton *v.* 394
Hallam, Evans *v.* 160
Hallewell, Hawker *v.* .. 99, 178
Halliday, Streatfield *v.* .. 323
Halthin, Steinmitz *v.* 393
Haly *v.* Barry 216
Hambidge *v.* De La Crouée .. 332
Hames *v.* Hames 280
Hamilton *v.* Bell 56
———— *v.* Hector 403
———— *v.* Kirwan 288
Hammond, Browne *v.* 365
———— *v.* Hammond .. 310
Hamper, Ex parte 329
Hampshire *v.* Bradley.. .. 307
Hanbury *v.* Kirkland 306
Hanchett *v.* Briscoe 397
Hancock *v.* Heywood 319
Handley, Keenan *v.* 79
Hanforth, Howell *v.* 276
Hannyngton, Garner *v.* .. 12
Hanrott *v.* Wombwell *v.* 285, 286
Hanson *v.* Keating 392
——— *v.* Meyer 39
Harben, Edwards *v.* 50
Harcourt *v.* Ramsbottom .. 199

PAGE

Hardey *v.* Green 310
Harding, Ex parte 52
Hardy *v.* Bern 116
——— Hall *v.* 205
Hare *v.* Horton 14
—— Hyat *v.* 331
Harewood, Lord, Milner *v.* .. 384
Harford, Neilson *v.* 251
Harland *v.* Binks 313
Harley *v.* Harley 397
Harmer *v.* Westmacott .. 266
Harms *v.* Parsons 97
Harnett *v.* Macdougall .. 402
Harper *v.* Faulder 12
——— Gordon *v.* .. 24, 27
Harrington *v.* Price 10
Harris, Ex parte 326
——— Gent *v.* 393
——— *v.* Lloyd .. 176, 363
——— *v.* Wall 82
Harrison, Brinsmead *v.* .. 45
——— Grimes *v.* 243
——— *v.* Jackson 332
——— *v.* Paynter 125
——— Stannard *v.* 261
Harrobin, Pole *v.* 94
Harrod, Mathieson *v.* 259
Harrop *v.* Howard 402
Hart *v.* Bush 41
—— *v.* Stephens 391
Hartford *v.* Jones 29
Hartley *v.* Case 92
Hartnell, Cripps *v.* 85
Harvey *v.* Aston 383
——— Goodman *v.* 412
Harwood *v.* Great Northern Railway Company 247
Haslam, Nickles *v.* 250
Hassall *v.* Wright 256
Hassell *v.* Hawkins 360
Hastings, Lord, Scott *v.* .. 216
Hatton, In re 135
Hawken *v.* Bourne 331
Hawker *v.* Hallewell.. 99, 178
Hawkes *v.* Hubback 402
Hawkesley, Francis *v.* .. 82
Hawkesworth, Bridges *v.* .. 25
————, Wolverhampton New Waterworks Company *v.* 221
Hawkins, Chesterfield and Midland Silkstone Colliery Company Limited *v.* 134
——— Hassell *v.* 360
Hawley, In re 204
——— Bagueley *v.* 416
——— Grantham *v.* 33
Haworth, Meyer *v.* 81
Hawtrey *v.* Butlin xliv

PAGE

Hay, Ex parte 324
—— v. Palmer 276
Hayes v. Hayes 357
—— Massy v. 400
Haygarth, Taylor v. 377
Hayley, Hope v. 34
Haymen, Stapleton v... .. 60
Haymes v. Cooper 31
Haynes, Brooke v. 343
Hayter v. Tucker 361
Hayward, Ex parte 145
——— Williams v. .. 243
Head, March v. 393
Headington, Holloway v. .. 80
Heard v. Stamford 398
Heath v. Hall 124
—— v. Key 123
—— v. Lewis 383
Heather, Richards v. 322
Heaver, Manser v. 200
Hebb's case 87
Hebdon v. West 184
Hecht, Hunt v. 40
Heckscher v. Gregory.. .. 213
Hector, Hamilton v. 403
Hedley v. Bainbridge 332
Heinekey v. Earle 44
Helleley, Johnson v. 269
Hellicar, Powell v. 341
Hembrow, Prior v. 196
Heming, Cherry v. 86
——— v. Swinnerton 194
Hemsworth v. Bryan 196
Henderson, Baker v. 30
——— Wilkinson v. .. 325
Heneage v. Hunloke 287
Henning, Whittle v. 397
Henshaw, Williams v. .. 316
Hensloe's case 344
Hepke, Greaves v. 36
Hereford, Bishop of, v. Griffin 257
Herlakenden's case .. 17, 18
Hertford, Marquis of, Attorney-General v. 355
Hesilrige, M'Donnell v. .. 312
Heslop v. Baker 56
——— Ex parte 56
Hewer, Hall v... 287
Hewison v. Guthrie 32
Hewitt v. Kaye 340
——— v. Price 240
——— Webb v. 123
Heyhoe v. Burge 329
Heywood, Allwood v... .. 12
——— Hancock v. 319
Hibbert, Simond v. 29
Hickman, Wheateroft v. .. 329
Hicks, Lovell v. 331

PAGE

Hidson v. Barclay 135
Higgins, Dunlop v. 87
——— v. Pitt 129
——— v. Sargent 120
——— Seed v... 252
Higgs, Blades v. 21
Hilbert, Tate v. .. 340, 341
Hill, Crook v. 363
—— v. Gomme 354
—— Johnson v. 28
—— Rex v. 198
—— v. Spencer 95
—— v. Thompson .. 249, 251
—— Warburton v. 216
Hill's patent 247
Hillary, Cranley v. 129
Hillman, Tapfield v. 33
Hills v. Hills 341
—— v. Liverpool United Gas-light Company 247
Hilton v. Girand 361
Hinchcliffe v. Hinchcliffe .. 360
Hinchinbrook, Lord, Shipbrook v. 306
Hind v. Gray 97
Hindley v. Westmeath, Marquis of 403
Hinton v. Pinke 358
Hirsh v. Im Thurn 192
Hiscox, Willis v. .. 306, 307
Hitchcock v. Coker 97
Hitchins v. Kilkenny, &c. Railway Company 222
Hitchman v. Stewart 122
——— v. Walton .. 14, 16
Hives, Adsetts v. 94
Hoadley v. M'Laine 40
Hoare v. Hornby 309
——— v. Parker 272
Hobby v. Allen 397
——— v. Collins 397
Hobson v. Bell 427
——— v. Blackburn 363
——— v. Thelluson 54
Hockley, Steadman v. .. 31
Hodge, Walter v. 340
Hodges, Belton v. 141
——— v. Croydon Canal Company 420
Hodgkinson v. Fernie.. .. 201
Hodgson v. Loy 43
——— Nash v. .. 88, 127
——— v. Shaw 121
——— Simonds v. 190
Hodson v. Observer Life Assurance Society 184
——— Wallis v. 375
Hoffman, Chollett v. 256

	PAGE
Hogg, Dean *v.*...	65
—— *v.* Skeen ..	331
Holden, Stokes *v.*	49
Holderness *v.* Collinson	29
———— *v.* Rankin	56
Holford *v.* Phipps	307
Holland *v.* Eyre	87
——— *v.* Hughes	210
Hollier, Ravenshaw *v.*	313
Hollinshead, Reid *v.*	331
Hollis *v.* Bryant	175
—— *v.* Claridge	31
Holloway *v.* Headington	80
Holmes *v.* Mackrell	82
———— *v.* Mitchell	84
———— *v.* Prescott	281
———— *v.* Tatton	126
Holroyd *v.* Marshall	34
Holst *v.* Pownal	44
Homan, Owen *v.*	123
Home, Campbell *v.*	288
Homewood, Leader *v.*...	15
Honner *v.* Morton	396
Hood, Wilson *v.*	31
Hooper *v.* Ramsbottom	12
——— *v.* Rossiter	274
Hope, Attorney-General *v.*	349
—— *v.* Hayley	34
—— *v.* Hope	404
Hopkins, Chanter *v.*	416
———— *v.* Clarke	180
———— *v.* Logan	78
———— *v.* Prescott	96
———— Tugman *v.*	400
Hopkinson *v.* Lee	317
Hopper, Re	204
Hopwood, Earle *v.*	101
Hornby, Hoare *v.*	309
Horne, Farina *v.*	41
Horner *v.* Flintoff	76
Hornsby *v.* Miller	51
Horsley *v.* Chaloner	355
Horton, Hare *v.*	14
——— Richardson *v.*	322
——— *v.* Sayers	191
——— Wells *v.*	85
Hosier, Franklin *v.*	28
Hotham *v.* Somerville	12
Houghton *v.* Houghton	318
———— *v.* Matthews	29
Houlston, Bogue *v.*	261
How, Jones *v.*	310
—— Pidding *v.*	267
Howard, Harrop *v.*	402
——— *v.* Rhodes	306
Howarth, Samuel *v.*	123
Howden *v.* Haigh	129
Howe *v.* Lord Dartmouth	210
Howe *v.* Synge	96
—— Whittaker *v.*	97
Howell *v.* Gayler	280
——— *v.* Hanforth	276
——— *v.* M'Ivers	124
Howes, Morris *v.*	280
Howse *v.* Chapman	361
Hubback, Hawkes *v.*	402
Hubbersty *v.* Manchester, Sheffield, &c. Railway Company	221
Hudson, Smith *v.*	40, 44
Hughes, Burton *v.*	27
——— Holland *v.*	210
——— *v.* Kelly	420
——— *v.* Layton	243
——— Oldham *v.*	301
——— Rann *v.*	77
——— Stoveld *v.*	35
——— *v.* Stubbs	313
——— *v.* Wynne	115, 422
Hughes's trusts, re	425
Hugonin, Hall *v.*	397
Hulkes *v.* Day	216
Hulme *v.* Chitty	404
Humble *v.* Mitchell	213, 240
——— M'Iver *v.*	327, 328
Hume *v.* Richardson	297
Humfrey *v.* Gery	420
Humpage, Grafftey *v.*...	280, 309
Humphrey, Peer *v.*	413
Humphreys, Davies *v.*	122
Hunloke, Heneage *v.*	287
Hunt *v.* Bate	78
—— *v.* Hecht	40
—— Knight *v.*...	129
—— *v.* Peacock	423
Hunter, Cruise *v.*	405
——— *v.* Daniel	98
——— *v.* Nockolds	420
Huntley *v.* Russell	73
Hurst *v.* Jennings	116
—— Parnham *v.*	124
—— Smith *v.*	313
Husbands, Ex parte	326
Hutchings *v.* Smith	395
Hutchinson, Fetherstone *v.*	96
Hutley *v.* Hutley	98
Hutton *v.* Scarborough Cliff Hotel Co.	235
Hyat *v.* Hare	331
Hyde *v.* Price	121

I.

Idle's case	19
Ilderton *v.* Castrique	134

PAGE

Ilfracombe Railway Company, Pickering *v.* 216
Im Thurn, Hirsch *v.* 192
India & London Life Assurance Company, Dalby *v.* 185
Inge *v.* Moseley 95
Ingham, Simson *v.* 128
Ingilby, Winn *v.* 16
Inglebach *v.* Nichols 134
Innes, Penny *v.* 92
Inns, Stalworth *v.* 199
Insole, Re 407
Irish Land Co., Norris *v.* .. 67
Irons *v.* Smallpiece 35
Irvine, Rannie *v.* 97
Irving *v.* Gray 135
—— Mercer *v.* 77
Iveson, Other *v.* 322
Izard, Blake *v.* 34

J.

Jackson, Re .. 57, 266, 425
——— Butcher *v.* 288
——— Harrison *v.* 332
——— *v.* Jackson 288
——— *v.* Nichol 44
——— Pearse *v.* 243
——— Purdew *v.* 396
——— *v.* Sinclair 420
——— *v.* Thompson 176
——— Thorpe *v.* 325
——— *v.* Woolley .. 88, 325
Jacquet *v.* Jacquet 423
Jacob, Worrall *v.* 403
James *v.* Durant 309
——— Richards *v.* 52
——— *v.* Thomas 115
Jamieson, In re 204
Janes, Edwards *v.* 88
Janson, Ex parte .. 326, 327
Jarvis, Smith *v.* 331
Jeffereyes, Watts *v.* 216
Jeffereys *v.* Small 318
Jeffery *v.* Jeffery 80
Jefferys *v.* Boosey 258
——— Boosey *v.* 256
Jenkins, Perry *v.* 421
——— Richardson *v.* 112
Jenkyn *v.* Vaughan 311
Jenkyns *v.* Usborne 44
Jennings *v.* Brown 81
——— Downes *v.* 399
——— Hurst *v.* 116
——— Rawlings *v.* 209
——— *v.* Rigby 109
Jervis, Radburn *v.* 208

PAGE

Jervoise *v.* Jervoise 387
——— *v.* Silk 293
Jessopp *v.* Watson 375
Johnes, Fores *v.* 96
Johnson, Buckland *v.* 45
——— Cooper *v.* 196
——— *v.* Fesenmayer .. 141
——— *v.* Helleley 269
——— *v.* Hill 28
——— *v.* Johnson 365
——— Rawson *v.* 43
——— *v.* Stear 27
——— Worrell *v.* 30
Johnson's Patent, Re 250
Jones *v.* Bowden 417
—— *v.* Bright 417
—— Burke *v.* 422
—— Cleave *v.* 88
—— *v.* Davids 121
—— Dewhirst *v.* 133
—— Edwards *v.* 35, 312, 341
—— Ford *v.* 204
—— Hartford *v.* 29
—— *v.* How 310
—— *v.* Lock 35
—— Macoubrey *v.* 287
—— Merryweather *v.* 403
—— *v.* Morris 133
—— *v.* Ogle 277
—— Reilly *v.* 76
—— Scott *v.* 423
—— Tyler *v.* 196
—— *v.* Waite 403
—— Waite *v.* 96
Joyce *v.* Swann 39
Judson, Nicholls *v.* 359
Jukes, Kilshaw *v.* 329

K.

Kain, Sheppard *v.* 416
Kaye, Hewitt *v.* 340
Keane, Mornington *v.* 310
Kearsley, Morris *v.* 318
——— *v.* Cole 324
Kearton, Dawson *v.* 81
Keating, Hanson *v.* 392
——— Smith *v.* 313
Keeley, Winch *v.* 124
Keenan *v.* Handley 79
Keightley *v.* Watson 317
Keith, Brooks *v.* 310
—— Rees *v.* 394
Kekewich *v.* Manning .. 312
Kelly, Archer *v.* 309
—— Hughes *v.* 420
Kemble *v.* Farren 76

PAGE
Kemp, Philanthropic Society *v.* 363
Kempe *v.* Andrews 318
——— *v.* Gibbon 419
Kendall, Brierley *v.* 51
Kennay, Rogers *v.* 24
Kennedy, Ex parte 326
——— Molony *v.* 400
Kensington *v.* Chandler .. 311
——— *v.* Dolland .. 400
——— Ex parte 326
Kenyon, Eastwood *v.* 81
Ker *v.* Lord Dungannon .. 272
Kerrison *v.* Cole 96
Kershaw, Dewhirst *v.*.. .. 134
Kettlewell, Meek *v.* 80
Key, Heath *v.* 123
Keys, Ex parte, In re Skinner 153, 160
Keysell, Topping *v.* 141
Kiddill *v.* Farnell 415
Kidson *v.* Turner 81
Kilkenny, &c. Railway Company, Devereux *v.* .. 221
——— Hitchins *v.* 222
Killby *v.* Wright 134
Kilshaw *v.* Jukes 329
Kimpton, Betts *v.* 392
Kincaid, In re 392
King (The) *v.* Sankey .. 30
See also Rex.
King *v.* England 32
—— Gaskell *v.* 96
—— *v.* Rendall 135
Kingsford *v.* Merry .. 36, 413
Kingsley's trust, In re .. 407
Kinnersley *v.* Mussen 107
Kinnier, Atkyns *v.* .. 76, 77, 97
Kirby *v.* Potter 357
Kirk *v.* Blurton 331
Kirkland, Hanbury *v.*.. .. 306
Kirkman *v.* Booth 328
——— Needham *v.*.. .. 310
Kirkpatrick *v.* Tattersall .. 81
Kirwan *v.* Daniel 313
——— Hamilton *v.* 288
Kitchen, Dickinson *v.*.. .. 63
Knatchbull *v.* Fearnhead .. 354
Knight *v.* Barber .. 213, 240
——— *v.* Boughton 275
——— *v.* Hunt 129
Kruges *v.* Wilcox 31
Kymer, Halford *v.* 185
Kynaston, Clayton *v.* .. 321, 324
——— Lacy *v.* 324
Kyne *v.* Moore 95
Kynman, Whinman *v.* .. 88
Kynnersley, Marquis of Ormond *v.* 205

L.

PAGE
Lacey, Thompson *v.* 28
Lack, Thompson *v.* .. 123, 324
Lackington *v.* Atherton .. 43
Lacy *v.* Kynaston 324
—— *v.* Rhys 258
Ladbrooke, Wheelhouse *v.* .. 116
Laing *v.* Fidgeon 417
—— Tucker *v.*.. 123
Lake *v.* Craddock 318
—— Tyler *v.* 400
—— Williams *v.* 84
Lambert's case.. 331
Lambert, Clough *v.* 404
Lampert's case.. .. 271, 331
Lampleigh *v.* Brathwait .. 78
Lamport, Collins *v.* 63
Lancashire & Yorks. Railway Company, Schotsmans *v.* .. 45
Lane *v.* Burghart 85
—— Durnford *v.* 384
Langdale, Lord, Ashton *v.* 361, 362
Langford, Avery *v.* 97
——— In re 298
Langham's trust, In re .. 362
Langston, Wetherell *v.* .. 318
Lashbrook *v.* Cock 320
Lassells *v.* Cornwallis 282
Lauderdale, Lord, Garrard *v.* 313
Lavater, Walton *v.* .. 254, 320
Lavender, Greedy *v.* 396
Law *v.* Bagwell 313
—— *v.* London Indisputable Life Policy Company .. 185
Lawrence, Hall *v.* 205
——— *v.* Smith 96
———, Sollers *v.* 72
Laws, Blacklow *v.* 400
Lawton *v.* Lawton 15
Laythoarp *v.* Bryant 86
Layton, Hughes *v.* 243
Lea, Barker *v.* 393
Leader *v.* Homewood 15
Leake *v.* Loveday 24
———, Monys *v.* 98
Leather Cloth Co. Limited *v.* American Leather Cloth Co. Limited 267
Lechmere *v.* Earl of Carlisle .. 301
——— *v.* Fletcher 87
Ledsam, Russell *v.* 247
Lee, Brown *v.* 122
——, Fielding *v.* 56
—— *v.* Griffin 42
—— Hopkinson *v.* 317
—— *v.* Lockhart 129
——, Morris *v.* 92
—— *v.* Muggeridge .. ..

PAGE

Lee *v.* Pain 364
—— *v.* Priceaux 400
—— Stannard *v.* 261
—— Waring *v.* 286
—— *v.* Young 299
Leeder, Biddell *v.* 96
Legg *v.* Evans 24, 31, 51
Legh, Courtauld *v.* 201
Leicester, Furniss *v.* 416
———— *v.* Rose 129
Leighton *v.* Wales .. 76, 97
Leith, Mant *v.* 295
Lempriere, De la Garde *v.* .. 393
Leonard *v.* Baker 177
Leonino, Gilkes *v.* 87
Lepard *v.* Vernon 415
Lepine *v.* Bean 364
Lescher, Bain *v.* 364
Leslie *v.* Guthrie 65
—— *v.* Richardson 198
—— Sing *v.* 287
Lett, Stahlschmidt *v.* 422
Le Vasseur *v.* Scratton 384, 395
Lewen *v.* Dodd 320
Lewers *v.* Earl of Shaftesbury 68
Lewis Bowles's case 19
Lewis, Gilbert *v.* 400
—— Heath *v.* 383
—— *v.* Madocks 310
—— *v.* Marling 247
—— Reynell *v.* 333
Lickbarrow *v.* Mason 44
Liford's case 18
Limbard *v.* Grote 287
Limerick, Earl of, Gray *v.* .. 286
Lincoln *v.* Windsor 306
Lindsay, Codrington *v.* .. 409
———— *v.* Gibbs 65
Lingard, Ex parte 205
Lingen *v.* Sowray 301
Linley *v.* Taylor 361
Linton, Trollope *v.* 385
Lisle, Agar *v.* 23
Lister, Tidd *v.* 394
Littlefield *v.* Shee 81
Liverpool, Corp. of, Scott *v.* .. 192
———— Marine Credit Co. *v.* Wilson 66
———— United Gas Light Co., Hills *v.* 247
Livesay *v.* Redfern 358
Llanwarne, In the Goods of .. 372
Lloyd *v.* Ashby 331
—— *v.* Baldwin 301
—— Bromage *v.* 90
—— Cullingworth *v.* 129
—— Harris *v.* .. 176, 363

PAGE

Lloyd *v.* Lloyd 383
—— Powell *v.* 130
—— *v.* Tench 375
Lock, Jones *v.* 35
Lockhart, Lee *v.* 129
———— *v.* Reilly 122
Lodge *v.* Pritchard 325
Loftus, Ricketts *v.* 285
Logan, Hopkins *v.* 78
Lomas *v.* Wright 117
London, Easton *v.* 12
London Dock Company, Calvert *v.* 123
———— Indisputable Life Policy Company, Law *v.* 185
Londonderry & Colerain Railway Company, Reg. *v.* 221
———————— Graham *v.* 387, 388
Long *v.* Storie 98
Longbottom *v.* Berry 14
Longman *v.* Tripp 266
Longstaff *v.* Meagoe 14
Lonsdale, Earl of, *v.* Countess of Berchtoldt 279
———————— Rigg *v.* .. 21
———— Prideaux *v.* 399
Lord, In re 204
Love *v.* Gaze 366
Loveacres *d.* Mudge *v.* Blight 320
Loveday, Leake *v.* 24
Lovell *v.* Hicks 331
Loveridge *v.* Cooper .. 424, 426
Low, Edmonds *v.* 359
—— *v.* Routledge 258
Lowe, Banner *v.* 276
Lowndes *v.* Collins 120
———— *v.* Lowndes .. 201, 202
Loy, Hodgson *v.* 43
Luard's case 398
Lucas *v.* Dorrien 36
—— *v.* Wilson 202
Lucy's case 79
Lunn, Bank of England *v.* 216, 217
—— *v.* Thornton 33
Lushington *v.* Boldero .. 18
Lyddon *v.* Ellison 287
Lyde *v.* Barnard .. 89, 426
—— *v.* Russell 15
Lye, Crutwell *v.* 268
Lygon *v.* Lord Coventry .. 294
Lynch *v.* Dalzell 188
Lyon *v.* Baker 306
—— Perrin *v.* 382
Lyons *v.* De Pass 413
Lysons *v.* Barrow 347
Lytton, Bennett *v.* 302

M.

	PAGE
Maberley *v.* Turton	293
Macarthur *v.* Campbell ..	202
Macaulay, Bailey *v.*	333
M'Culloch, Barrack *v.* ..	311
M'Donald, Walter *v.*	91
M'Donnell *v.* Hesilrige ..	312
Macdongall, Harnett *v.* ..	402
——— *v.* Robertson	196, 197
M'Ewan *v.* Smith	36
M'Guire, Ashburner *v.* ..	358
M'Iver *v.* Humble ..	327, 328
M'Ivers, Howell *v.*	124
Mackay, Bentley *v.*	312
——— *v.* Douglas	311
M'Kenzie's Settlement, Re ..	309
Mackenzie *v.* Mackenzie ..	280
——— Sandeman *v.* ..	286
Mackinnon *v.* Stewart.. ..	313
Mackintosh *v.* Trotter.. ..	14
——— Wellington *v.* ..	191
Mackrell, Holmes *v.*	82
M'Laine, Hoadley *v.*	40
Maclaren *v.* Stainton	274
Macleod *v.* Annesley	296
——— *v.* Drummond	353
M'Michael, Boydell *v.* ..	16
Macnaught *v.* Russell	135
M'Neillie *v.* Acton	328
Macoubrey *v.* Jones	287
M'Queen *v.* Farquhar.. ..	288
Maddison, Benyon *v.*	279
Madeley, Gaters *v.*	391
Madocks, Lewis *v.*	310
Maguire, Caulfield *v.*	121
Mainwaring's Settlement, Re	310
Malcolm *v.* Charlesworth ..	394
Malkin *v.* Adams	140
——— Attorney-General *v.* ..	280
Mallan *v.* May	96, 97
Mallet, Dunnicliff *v.*	320
Malone *v.* Minoughan.. ..	11
Maltby *v.* Carstairs	123
Man *v.* Shiffner	29
Manchester, Sheffield, &c. Railway Company, Hubbersty *v.*	221
Manders *v.* Williams	26
Mangles, Naylor *v.*	29
Mann, Burnet *v.*	375
Manning's, Mathew, case ..	271
——— Kekewich *v.* ..	312
Manser *v.* Heaver	200
Mant *v.* Leith	295
March *v.* Attorney-General ..	361
—— *v.* Head	393
—— *v.* Russell..	354
—— *v.* Warwick	135
Mare *v.* Earle	129
Mare *v.* Warner	129
Market overt, the case of ..	413
Markham, Bunn *v.*	341
Marlborough, the Duke of, *v.* St. John	73
Marling, Lewis *v.*	247
Marriott *v.* The Anchor Reversionary Co. Limited ..	63
Marris, Bower *v.*	128
Marsh, Archer *v.*	97
——— *v.* Conquest	258
——— Stone *v.* ..	331, 414
Marshall *v.* Fowler	393
——— Gardner *v.*	393
——— Holroyd *v.*	34
Martin, Collins *v.*	92
——— *v.* Crompe	318
——— Reynish *v.*	383
——— *v.* Sedgwick ..	332, 427
——— Townsend *v.*	358
Martindale, Anderson *v.* ..	317
——— *v.* Booth	50
——— *v.* Smith	38
——— Taylor *v.*	208
Mason *v.* Broadbent	420
——— Davis *v.*	97
——— *v.* Haddam	192
——— Lickbarrow *v.*	44
——— *v.* Morgan	391
——— Sidwell *v.*	82
——— *v.* Wallis	198
Massy *v.* Hayes	400
Mather *v.* Fraser ..	14, 52
——— *v.* Scott	362
Mathers *v.* Green	320
Mathias, Gray *v.*	95
Mathieson *v.* Harrod	259
Matthews *v.* Brise	295
——— Houghton *v.* ..	29
——— Young *v.*	35
Maude, Benson *v.*	354
——— Scales *v.*	35
Maunder, Wright *v.*	176
Maw, Elwes *v.*	15
Mawdesley, Driver *v.*	313
Maxwell's trusts, In re ..	275
May *v.* Chapman	92
—— Croxton *v.*	393
—— Mallan *v.*.. ..	96, 97
Mayor, Boaler *v.*	123
——— Squire *v.*	16
Maze, Aubert *v.*	95
Meacher *v.* Younge	293
Meagoe, Longstaff *v.*	14
Medina *v.* Stoughton	416
Medworth *v.* Pope	363
Meek *v.* Kettlewell	80
Melvill, Otter *v.*	309

PAGE

Melville, Preston *v.* 274
Mentney *v.* Petty 375
Menzies, Betts *v.* 247
Mercer *v.* Irving 77
Meredith *v.* Farr 363
Merrett, Powell *v.* 377
Merriman, Elliot *v.* 352
——— *v.* Ward 128
Merry, Kingsford *v.* .. 36, 413
Merryweather *v.* Jones .. 403
Meryon *v.* Collett 280
Metcalf, Wise *v.* 73
Metropolitan Counties, &c. Society *v.* Brown 14
Menx *v.* Bell 425
Mexborough *v.* Bower .. 191
Meyer, Hanson *v.* 39
——— *v.* Haworth 81
Meyrick, Attorney-General *v.* .. 361
Michell *v.* Michell 275
Michelmore *v.* Mudge 395
Middlesex, Sheriff of, Ex parte; in re England 135
Middleton, Copis *v.* 121
Miles *v.* Presland 216
Mill, The Queen *v.* 252
Miller, Hornsby *v.* 51
——— *v.* Miller .. 35, 340
——— *v.* Race 412
——— Spackman *v.* 51
——— Stanger *v.* 130
——— *v.* Taylor 256
Mills *v.* Barber 89
—— Ex parte, in re Tew .. xliv
Milne, Walker *v.* 361
——— Walmesley *v.* 14
Milner *v.* Lord Harewood .. 384
Milvain, Chapman *v.* 223
Minnit *v.* Whinnery 331
Minoughan, Malone *v.* .. 11
Mitchell, Brooke *v.* 24, 196, 197
——— Doe *d.* Esdaile *v.* .. 157
——— *v.* Ede 36
——— Holmes *v.* 84
——— Humble *v.* .. 213, 240
Moffatt, Bank of England *v.* .. 217
Mollard, Bagley *v.* 363
Mollett *v.* Wackerbath .. 94
Molony *v.* Kennedy 400
Monkman *v.* Shepherdson .. 81
Montague *v.* Benedict 398
Montefiore *v.* Guedalla .. 360
Montolieu, Lady Elibank *v.* .. 393
Monys *v.* Leake 99
Moodie *v.* Bannister 419
Moor *v.* Barham 375
—— Stokes *v.* 86
—— Williams *v.* 82

PAGE

Moore, Cramer *v.* 310
——— *v.* Darton 340
——— *v.* Frowd 305
——— Kyne *v.* 95
——— *v.* Moore 402
——— *v.* Morris 402
Mordue *v.* Palmer 203
Morell *v.* Dubost 106
Morgan, Ex parte 135
——— Mason *v.* 391
——— Osborn *v.* 394
——— Rickman *v.* 360
——— *v.* The Earl of Abergavenny 20
Morley *v.* Attenborough .. 416
——— Bird *v.* 316, 364
——— *v.* Boothby 84
——— Child *v.* 213
——— *v.* Rennoldson .. 382, 383
——— Roddam *v.* 419
——— Wright *v.* 394
Mornington *v.* Keane 310
Morris *v.* Glynn 361
——— *v.* Howes 280
——— Jones *v.* 133
——— *v.* Kearsley 318
——— *v.* Lee 92
——— Moore *v.* 402
——— Duke of Newcastle *v.* .. 180
Morrison, Collett *v.* 185
——— Dutton *v.* 130
——— *v.* Glover 243
Mortimer *v.* Picton 297
Mortimore *v.* Mortimore .. 295
Morton *v.* Copeland 258
——— Honner *v.* 396
——— *v.* Tibbett 40
Moseley, Inge *v.* 95
Mosley *v.* Baker 242
Moss, Burrough *v.* 391
—— *v.* Hall 123
—— Turquand *v.* 135
Motley *v.* Downman 267
Moufflet *v.* Cole 97
Mudge, Michelmore *v.* .. 395
Muggeridge, Lee *v.* 81
Mullen *v.* Bowman 366
Mullings, Phillips *v.* 313
Munnings, Attwood *v.* .. 415
Munro, Ex parte 425
Murray *v.* East India Company 421
——— *v.* Lord Elibank 393, 394
Mussen, Kinnersley *v.* 107
Myers *v.* Perigal 361

N.

Nash *v.* Hodgson .. 88, 127
—— Sprigens *v.* 204

	PAGE
Naylor *v.* Mangles	29
Neate, Franklin *v.*	26
Needham *v.* Kirkman	310
——— *v.* Smith	310
——— Webb *v.*	369
Neilson, Ex parte	226
—— *v.* Harford	251
Nesham, Barry *v.*	329
Netherseal, Rex *v.*	345
Nevill, Walker *v.*	135
Newall, In re	247, 248
Newbon, Wakefield *v.*	30
Newcastle, Duke of, *v.* Morris .	180
Newman, Page *v.*	120
Newnham, Parbery *v.*	198
Newton, Ex parte	305
——— *v.* Askew	312
——— *v.* Beck	11
——— and Hetherington, Re	194
Nichol, Jackson *v.*	44
Nicholls *v.* Bastard	26
——— *v.* Judson	359
——— *v.* Rosewarne ..	244
——— *v.* Stretton ..	96, 97
Nichols, Inglebach *v.*	134
——— *v.* Norris	129
——— *v.* Roe	201, 202
Nicholson *v.* Bower	40
——— Potter *v.*	107
——— *v.* Potts	134
——— *v.* Revill ..	123, 324
Nickels *v.* Haslam	251
Nicolls, Smith *v.*	109
Nimmo, Ellis *v.*	80
Nix, Bryans *v.*	36
Nixon *v.* Brownlow	222
Noble, Devaynes *v.* ..	128, 325
——— Vulliamy *v.*	328
Nockolds, Hunter *v.*	420
Norbury *v.* Norbury	210
Norcliffe, Ambergate, &c. Railway Company *v.*	221
Norcott *v.* Gordon	359
Norfolk Estuary Co., Hall *v.* ..	221
Norman *v.* Baldry	354
——— Fergusson *v.*	95
——— *v.* Phillips	41
——— *v.* Thompson	127
Norris *v.* Irish Land Co. ..	67
—— Nichols *v.*	129
—— *v.* Wright	296
North Eastern Metropolitan Asylum District, Gibbons *v.*	87
Northey *v.* Field	44
——— *v.* Northey	388
Norton *v.* Frecker	422
——— Re	170
Norton's patent, In re ..	247
Norwood, Elvy *v.*	420
Nourse, Richardson *v.*	200
Nugent, Blair *v.*	418
——— *v.* Gifford	352
Numes *v.* Scipio	213
Nuttall, Cannington *v.* ..	252

O.

	PAGE
Observer Life Assurance Society, Hodson *v.*	184
Ockenden, Ex parte	28
Ogilvie *v.* Foljambe	86
Ogle, Jones *v.*	277
Oldham *v.* Hughes	301
Olive, Stephens *v.*	403
Oliver, Ex parte	129
——— Smith *v.*	362
Oliveira, Beaumont *v.*	363
Onslow *v.* Onslow	377
Onwhyn, Stockdale *v.* ..	96
Ormond (Marquis of) *v.* Kynnersley	205
Orr *v.* Dickinson	64
Osborn *v.* Morgan	394
——— Silk *v.*	166
Other *v.* Iveson	322
Otter *v.* Melvill	309
Oulton, Crallan *v.*	422
Ouseley *v.* Anstruther ..	210
Overhill's trust	363
Owen, Eardley *v.*	310
—— *v.* Homan	123
—— *v.* Thomas	87
Oxford, Earl of, Beavan *v.* ..	216

P.

	PAGE
Packman, Sloane *v.*	98
Page *v.* Bennett	189
—— *v.* Newman	120
—— *v.* Page	364
—— Powles *v.* .. 332,	427
—— *v.* Wisden	259
Paget *v.* Foley	420
Pain, Lee *v.*	364
—— Ridont *v.* 200,	201
—— *v.* Whitaker	27
Paine, Gleaves *v.*	392
Palles, Simmonds *v.*	313
Palmer, Fraser *v.*	305
——— Hall *v.*	95
——— Hay *v.*	276
——— Mordue *v.*	203
——— Vandenberg *v.* ..	35
——— *v.* Wakefield	398

	PAGE
Palmer *v.* Wheeler	288
Parbery *v.* Newnham	198
Pardo *v.* Bingham	419
Paris *v.* Paris	274
—— Sparrow *v.*	76
Parish, Drummond *v.*	336
Parker, Baldey *v.*	41
——— Clarke *v.*	383
——— Hoare *v.*	272
——— Sparling *v.*	361
——— Stanes *v.*	305
——— Watson *v.*	117
Parkes *v.* Smith	194
Parkin *v.* Carruthers	327
Parkinson, Ames *v.*	210
Parnham *v.* Hurst	124
Parrott, Alger *v.*	280
Parry, Barrett *v.*	197
Parsons, Bank of England *v.*	217
——— Harms *v.*	97
Partington, Andrews *v.*	293
Partridge, Wheldale *v.*	300
Pass, Poole *v.*	307
Patch, Channon *v.*	18
Patent Derrick Co., Thames Iron Works Co. *v.*	28
Paton *v.* Sheppard	276
Paul *v.* Children	363
Paull *v.* Best	163
Pawle *v.* Gunn	213
Pawlett (Lord William), Ex parte	296
Paxton, Cholmeley *v.*	19
——— *v.* Popham	94
Payne *v.* Deakle	197
Paynter, Adams *v.*	304
——— Harrison *v.*	125
Peacock, Berriman *v.*	18
——— Hunt *v.*	423
——— *v.* Rhodes	90, 412
Peake, Ex parte	326
Pearly *v.* Smith	275
Pearse *v.* Jackson	243
Pearson *v.* Dawson	36, 41
——— Foster *v.*	412
——— Freeland *v.*	365
Peck, Dawes *v.*	41, 44
Pedley *v.* Goddard	202
Peel, Cockburn *v.*	297
—— *v.* Tatlock	123
Peer *v.* Humphrey	413
Peering, Ford *v.*	12
Pelly *v.* Wathen	30
Pemberton, Ex parte	30
——— *v.* Vaughan	97
——— Wortham *v.*	392
Pendlebury *v.* Walker	123, 129
Pennell *v.* Reynolds	141
Pennistone, Waterfall *v.*	52
Penny *v.* Innes	92
Penoyre, Ward *v.*	354
Penton, Davies *v.*	76
Perigal, Myers *v.*	361
Perkins *v.* Bradley	48
——— Groves *v.*	393
——— Walker *v.*	95
Perrin *v.* Lyon	382
Perry, Creed *v.*	396
—— *v.* Jenkins	421
—— *v.* Truefit	267
Perry's Executors *v.* The Queen	365
Petch *v.* Tutin	33
Peter *v.* Compton	85
—— *v.* Rich	122
Peterborough (Bishop of), Boyle *v.*	285
Petre *v.* Espinasse	312
Petrie *v.* Bury	315
Pettitt, Thompson *v.*	38
Petty *v.* Anderson	398
—— Mentney *v.*	375
—— *v.* Styward	319
Pfleger *v.* Browne	127, 129
Phelp *v.* Amcotts	310
Philanthropic Society *v.* Kemp	363
Philips *v.* Robinson	10
Phillips *v.* Mullings	313
——— Norman *v.*	41
——— *v.* Phillips	318, 320
——— Swann *v.*	89, 426
Phillipson *v.* Gatty	295
Philpot *v.* Briant	123
Philpott, Ex parte	130
——— *v.* St. George's Hospital	362
Phipps, Holford *v.*	307
Pickering *v.* Appleby	213
——— *v.* Busk	415
——— *v.* Dowson	416
——— *v.* Ilfracombe Railway Co.	216
——— Pocock *v.*	107
Pickford, Aspinall *v.*	29
Picton, Mortimer *v.*	297
——— Shaw *v.*	127
Pidding *v.* How	267
Pidgley *v.* Rawling	18
Pierce *v.* Thornely	395
Pierson *v.* Garnet	287
Piggott, Clancy *v.*	84
——— Wilson *v.*	285, 286
Pigot *v.* Cubley	26, 27
Pigot's case	94
Pilck, Shower *v.*	35
Pilkington, Smith *v.*	242
Pimbley, Fisher *v.*	200

PAGE

Pinchon's case 112
Pinke, Hinton *v.* 358
Pinkney *v.* Hall 331
Piper, Cradock *v.* 306
Pitt, Higgins *v.* 129
Plaice, Russell *v.* 352
Platt *v.* Routh 350
Plummer, In re 326
Plymouth (Earl of), Ridout *v.* 388
Pocock, Brown *v.* 401
——— *v.* Pickering 107
——— Roberts *v.* 358
Pole *v.* Harrobin 94
Poole, Crofton *v.* 166
——— *v.* Pass 307
Pope, Medworth *v.* 363
—— Rusden *v.* .. 63, 66
—— Seagrave *v.* 242
Popham, Paxton *v.* 94
Poppleton, Everard *v.* .. 107
Porter, Sprye *v.* 98
——— Watts *v.* 216
——— Whitehead *v.* 133
Portland (Duke of), Topham *v.* 288
Pott *v.* Eyton 329
Potter, Hall *v.* 383
——— Kirby *v.* 357
——— *v.* Nicholson 107
Potts, Nicholson *v.* 134
Powel, Shafto *v.* 109
Powell *v.* Hellicar 341
——— *v.* Lloyd 130
——— *v.* Merrett 377
——— *v.* Rees 71
Power *v.* Barham 416
Powle *v.* Gunn 78
Powles *v.* Page 332, 427
Pownal, Holst *v.* 44
Prance *v.* Sympson 82
Presland, Miles *v.* 216
Prescot, Snee *v.* 44
Prescott *v.* Boucher 392
——— Holmes *v.* 281
——— Hopkins *v.* 96
Preston *v.* Melville 274
Prestwood, Durant *v.* 375
Price *v.* Anderson 274
—— Barker *v.* 324
—— *v.* Green 76
—— Green *v.* 96, 97
—— Harrington *v.* 10
—— Hewitt *v.* 240
—— Hyde *v.* 121
—— Prosser *v.* 243
—— *v.* Richardson 84
Pride *v.* Fooks 210, 307
Prideaux *v.* Lonsdale 399
Prieaux, Lee *v.* 400

PAGE

Pring *v.* Pring 366
Prior *v.* Hembrow 196
Pritchard *v.* Arbouin 362
——— Lodge *v.* 325
——— Shaw *v.* 98
Proctor *v.* Sergeant 97
Prosser, Evans *v.* 383
——— *v.* Price 243
Proudley *v.* Fielder 400
Pryor *v.* Pryor 288
Pugh *v.* Arton 15
—— *v.* Stringfield 318
—— *v.* Taylor 399
Pulham, Firmin *v.* 306
Pullen *v.* Purbecke 55
Purbecke, Pullen *v.* 55
Purdew *v.* Jackson 396
Pye, Ridout *v.* 199
Pym *v.* Great Northern Railw. Co. 69
—— Sweet *v.* 31

Q.

Quartermaine *v.* Bittleston .. 56
Queen, The, *v.* Mill 252
——— *v.* The Lords of the Treasury .. 276
——— Perry's Executors *v.* .. 365
——— Tynte *v.* 48
——— *v.* Whitmarsh .. 224
See also Regina.

R.

Race, Miller *v.* 412
Rachfield *v.* Careless 366
Radburn *v.* Jervis 208
Ralph, Bird *v.* 73
Ralston *v.* Smith 252
Ram, Ex parte 423
Ramsbottom, Harcourt *v.* .. 199
——— Hooper *v.* .. 12
Ramsden *v.* Smith 310
Randall *v.* Randall 318
——— *v.* Russell 273
Rankin, Holderness *v.* 56
——— *v.* Weguelin 340
Rann *v.* Hughes 77
Rannie *v.* Irvine 97
Ransome *v.* Burgess 293
Ravenshaw *v.* Hollier 313
Rawling, Pidgley *v.* 18
Rawlings *v.* Jennings 209
——— Re 135
Rawlinson *v.* Clarke 329

PAGE

Rawlinson, Williams *v.* .. 128
Rawson *v.* Johnston 43
Rawsthorn *v.* Arnold 202
Read, Belding *v.* 33
Reay, Cookson *v.* 301
—— *v.* Richardson 127
Redfern, Livesay *v.* 358
Reed *v.* Wilmot 50
Rees *v.* Keith 394
—— Powell *v.* 71
Reeve, Beaumont *v.* 81
——— *v.* Whitmore 34
Reeves *v.* Watts 134
Regina *v.* Londonderry and Coleraine Railway Co. 221
——— Tynte *v.* 48
——— *v.* Whitmarsh 224
See also Queen, The.
Reid, Donellan *v.* 86
—— *v.* Fryatt 198
—— *v.* Hollinshead 331
—— West *v.* 427
Reilly *v.* Jones 76
——— Lockhart *v.* 122
Reindell *v.* Schell 76
Rendall, King *v.* 135
Rennoldson, Morley *v.* 382, 383
Revill, Nicholson *v.* .. 123, 324
Rex *v.* Bardell 194
—— *v.* Collector of Customs .. 318
—— *v.* Greenhill 405
—— *v.* Hill 198
—— *v.* Netherseal 345
—— *v.* Sankey 30
—— *v.* Sherrington 404
—— *v.* Wheeler 251
Reynell *v.* Lewis 333
Reynish *v.* Martin 383
Reynolds, Bodley *v.* 45
——— *v.* Bowley 327
——— *v.* Hall 56
——— Pennell *v.* 141
——— Robinson *v.* 92
Rhodes, Howard *v.* 306
——— Peacock *v.* .. 90, 412
——— *v.* Smethurst 422
Rhys, Lacy *v.* 258
Rice *v.* Shute 325
—— Weall *v.* 360
Rich, Peter *v.* 122
Richards *v.* Heather 322
——— *v.* James 52
——— *v.* Richards 391
——— Wilding *v.* 313
Richardson *v.* Bank of England 223
——— *v.* Brown 416
——— —— Ex parte 328
——— —— *v.* Gilbert .. 257

PAGE

Richardson *v.* Greese 360
——— *v.* Horton 322
——— Hume *v.* 297
——— *v.* Jenkins .. 112
——— —— Leslie *v.* 198
——— *v.* Nourse 200
——— —— Price *v.* 84
——— —— Reay *v.* 127
——— —— Warwick *v.* .. 321
Riches, In re 331
Ricketts, Griffith *v.* .. 300, 313
——— *v.* Loftus 285
Rickman *v.* Morgan 360
Ridgway *v.* Clare 325
Ridley *v.* Ridley 85
Ridout *v.* Earl of Plymouth .. 388
——— *v.* Pain .. 200, 201
——— *v.* Pye 199
Rigby, Re 109
——— Jennings *v.* 109
Rigg *v.* Earl of Lonsdale .. 21
Right *d.* Compton *v.* Compton 383
Ripley *v.* Waterworth .. 218
Rishton *v.* Cobb 382
Roberts, Bramah *v.* 332
——— Cave *v.* 377
——— *v.* Pocock 358
——— *v.* Spicer 400
——— *v.* Walker 48
——— *v.* Wyatt 24
Robertson, Dimsdale *v.* .. 197
——— Macdougall *v.* 196, 197
Robinson, Brandon *v.* 401
——— Crow *v.* 216
——— Cusack *v.* 40
——— *v.* Geldard 363
——— Philips *v.* 10
——— *v.* Reynolds 92
——— *v.* Robinson .. 210, 295
——— *v.* Wheelwright .. 401
Roddam *v.* Morley 419
Rodway, Sanders *v.* 403
Roe, Nichols *v.* .. 201, 202
Roger *v.* The Comptoir d'Escompte de Paris .. 44
—— *v.* Kennay 24
Rogers, Abbott *v.* 225
——— *v.* Acaster 397
——— Chaplin *v.* 35
Rogers's trusts, Re 276
Rolle, Ryall *v.* 51
Rose, Leicester *v.* 129
Rosewarne, Nicholls *v.* .. 244
Rosier, Shackell *v.* 79
Ross *v.* Adcock 73
—— Bateman *v.* 404
Ross's trust 374, 402
Rossiter, Hooper *v.* 274

PAGE
Rouch *v.* Great Western Ry. Co. 157
Round, Addison *v.* 24
Roundell *v.* Brearey 310
Rouse, Re 194
Routh, Platt *v.* 350
Routledge *v.* Dorril .. 287, 289
——— *v.* Grant 87
——— Low *v.* 258
Rowland, Clegg *v.* 355
Rowlands, Cope *v.* 95
Rowlandson, Ex parte .. 329
Rowles, Ryall *v.* .. 35, 51
Royal Exchange Assurance Co., Elliott *v.* 192
Royal Mail Co., Enropean Co. *v.* 63
Ruddell *v.* Dobree 341
Rudge *v.* Winnall 17
Rusden *v.* Pope .. 63, 66
Rushforth *v.* Hadfield 29
Russell, Douglas *v.* 65
——— Huntley *v.* 73
——— *v.* Ledsam 247
——— Lyde *v.* 15
——— Macnaught *v.* 135
——— March *v.* 354
——— *v.* Plaice 352
——— Randall *v.* 273
——— *v.* Smith 258
Rutland, Duke of, *v.* Duchess of Rutland 375
Ryall *v.* Rolle 51
—— *v.* Rowles 35, 51

S.

Saddler's Company *v.* Badcock 188
St. George's Hospital, Philpott *v.* 362
St. John, Lord, *v.* Boughton .. 418
——— Lord, *v.* St. John, Lady 404
St. John, Duke of Marlborough *v.* 73
Sainter *v.* Ferguson 76
Salkeld, In re 204
Saloon Omnibus Company, Hale *v.* 54
Salt, Andrews *v.* 404
—— Stead *v.* 332
Samon's case 199
Samuda, Zwinger *v.* 36
Samuel *v.* Duke 413
——— *v.* Howarth 123
Sandeman *v.* Mackenzie .. 286
Sanders, Bloxam *v.* .. 43, 45
——— *v.* Rodway 403
Sanderson *v.* Bell 28
Sandwich, Lord, Case of .. 288
Sandys, Warburton *v.* 304
PAGE
Sanger, Cutten *v.* 311
——— *v.* Sanger 398
Sankey, Rex *v.* 30
Sargent, Higgins *v.* 120
Saunders, De Mautort *v.* .. 325
——— Tollit *v.* 205
——— *v.* Topp 40
——— *v.* Wakefield .. 84
Savage, Browne *v.* 425
Savill *v.* Barchard 29
Sawyer, Whittem *v.* 393
Sayers, Horton *v.* 191
Scales *v.* Maude 35
Scarborough Cliff Hotel Co., Hutton *v.* 235
Scarborough *v.* Borman 401, 402
Scarpellini *v.* Atcheson .. 391
Scattergood *v.* Sylvester .. 414
Schell, Reindell *v.* 76
Schotsmans *v.* Lanc. & Yorks. Railway Comp. 45
Schwabe, Clift *v.* 184
Scipio, Nunes *v.* 213
Scott *v.* Avery 192
—— Champernown *v.* .. 30
—— *v.* Corporation of Liverpool 192
—— Driver *v.* 307
—— Drury *v.* 310
—— Evans *v.* 291
—— *v.* Jones 423
—— *v.* Lord Hastings .. 216
—— Mather *v.* 362
—— *v.* Spashett .. 393, 394
—— *v.* Van Sandau .. 195, 199
Scottish Union, &c., Simpson *v.* 188
Scratton, Le Vasseur *v.* 384, 395
Seagrave *v.* Pope 242
Seaton *v.* Benedict 398
Sedgwick, Martin *v.* .. 332, 427
Seed *v.* Higgins 252
Selby *v.* Selby 86
Self, Fleming *v.* 242
Sergent, Proctor *v.* 97
Seton, Clarke *v.* 115
Sewell, Stickney *v.* 295
Shackell *v.* Rosier 79
Shaftesbury, Earl of, Lewers *v.* 68
Shafto *v.* Powel 109
Shalmer, Spalding *v.* 301
Shaw, Badger *v.* 52
—— Hodgson *v.* 121
—— *v.* Picton 127
—— *v.* Pritchard 98
Shee, Clarke *v.* 412
—— Littlefield *v.* 81
Shelley, Gill *v.* 363
Shepherd, Cooper *v.* 45

	PAGE
Shepherd, Zachary *v.*	201
Shepherdson, Monkman *v.*	81
Shepley *v.* Davis	39
Sheppard *v.* Duke	418
——— Paton *v.*	276
Shepperd *v.* Kain	416
Sherrard *v.* Sherrard	275
Sherrington, Rex *v.*	404
——— *v.* Yates	391
Sherwood, In re	305
Shewen *v.* Vanderhorst	422
Shiffner, Man *v.*	29
Shilling *v.* Accidental Death Insurance Company	184
Shipbrook, Lord *v.* Lord Hinchinbrook	306
Shipman, Bush *v.*	129
Shore, Lady, *v.* Billingsley	316
Shorrock, Boyd *v.*	52, xliv
Shortland, Ex parte	311
Shower *v.* Pilck	35
Shute, Rice *v.*	325
Shuttleworth *v.* Greaves	357
——— Wigg *v.*	96
Sibree *v.* Tripp	127
Sidwell *v.* Mason	82
Silk, Jervoise *v.*	293
—— *v.* Osborn	166
Simmonds *v.* Palles	313
Simmons, Farebrother *v.*	42
——— *v.* Gutteridge	343
Simond *v.* Hibbert	29
Simonds *v.* Hodgson	190
Simpson, Cowell *v.*	29, 31
——— Garrod *v.*	133
——— *v.* Scottish Union, &c.	188
——— Thompson *v.*	288
Sims *v.* Thomas	311, 420
Simson *v.* Ingham	128
Sinclair *v.* Jackson	420
Sing *v.* Leslie	287
Skarf *v.* Soulby	311
Skeen, Hogg *v.*	331
Skerrat, Ex parte	311
Skey *v.* Barnes	290
Skillern, Amies *v.*	316
Skinner, In re	153, 160
——— Braithwaite *v.*	6
——— *v.* Upshaw	28
Skip, West *v.*	35
Slatter *v.* Slatter	404
Sleech *v.* Thorington	358
Slingsby's case	315, 317
Sloane *v.* Packman	99
Smailes *v.* Wright	204
Small, Churchill *v.*	12
—— Jeffereys *v.*	318
Smallpiece, Irons *v.*	35
Smarte *v.* Edsun	323
Smethurst, Rhodes *v.*	422
Smith, Re	134
——— Allen *v.*	28
——— Antrobus *v.*	35
——— *v.* Bond	115
——— *v.* Bruning	384
——— Carpenter *v.*	247
——— *v.* Chichester	30
——— *v.* Clarke	91
——— Farmer *v.*	242
——— Fox *v.*	200
——— Grace *v.*	329
——— *v.* Hudson	40, 44
——— *v.* Hurst	313
——— Hutchings *v.*	395
——— *v.* Jarvis	331
——— *v.* Keating	313
——— Lawrence *v.*	96
——— M'Ewan *v.*	36
——— Martindale *v.*	38
——— Needham *v.*	310
——— *v.* Nicolls	109
——— *v.* Oliver	362
——— Parkes *v.*	194
——— Pearly *v.*	275
——— *v.* Pilkington	242
——— Ralston *v.*	252
——— Ramsden *v.*	310
——— Russell *v.*	258
——— *v.* Smith	355, 425
——— Vernon *v.*	188
——— Wadsworth *v.*	194
——— *v.* Whitmore	202
——— Whitmore *v.*	199
——— Williams *v.*	413
Smithard, Cornforth *v.*	82
Snee *v.* Prescot	44
Snellgrove *v.* Baily	340
Snow, Goddard *v.*	399
—— Wilbraham *v.*	24
Soane, Conduitt *v.*	273
Sollers *v.* Lawrence	72
Soloman *v.* Graham	48
Somerville, Hotham *v.*	12
Somes, British Empire Shipping Company *v.*	28
Sothern, Swanwick *v.*	39
Souch *v.* Strawbridge	85
Soulby, Skarf *v.*	311
South Carolina Bank *v.* Case	331
Sowray, Lingen *v.*	301
Spackman *v.* Miller	51
Spalding *v.* Shalmer	301
Sparling *v.* Parker	361
Sparrow, Ex parte	51
——— Farmer *v.*	242
——— *v.* Paris	76

	PAGE
Spashett, Scott *v.* ..	393, 394
Spencer, Hill *v.* ..	.. 95
——— *v.* Spencer ..	.. 287
Spettigue, White *v.* ..	.. 413
Spicer, Roberts *v.* ..	.. 400
Spiers, Thompson *v.* ..	425, 426
Spirett *v.* Willows ..	.. 393
Spooner, Vandenburgh *v.*	.. 42
Sprague, Ex parte ..	.. 327
Sprigens *v.* Nash ..	.. 204
Sprye *v.* Porter ..	.. 98
Squire *v.* Mayor ..	.. 16
——— *v.* Whitton ..	.. 123
Stafford, Earl of, *v.* Buckley	.. 208
Stahlschmidt *v.* Lett ..	.. 422
Stainbank, Davies *v.* ..	.. 123
Stainton, Maclaren *v.* ..	.. 274
Stallwood, Tharpe *v.* ..	.. 370
Stalworth *v.* Inns ..	.. 199
Stamford, Heard *v.* ..	.. 398
Stamper *v.* Barker ..	.. 404
Stanes *v.* Parker ..	.. 305
Stanger *v.* Miller ..	.. 130
Staniland *v.* Willott ..	.. 311
Stanley *v.* Bernes ..	.. 338
Stannard, Angier *v.* ..	.. 307
——— *v.* Harrison ..	.. 261
——— *v.* Lee ..	.. 261
Stansfeld *v.* Cubitt ..	.. 52
Stanton *v.* Hall ..	.. 394
Stapleton *v.* Haymen ..	.. 60
Statham, Adam *v.* ..	.. 200
Stead, Barker *v.* ..	.. 333
—— *v.* Salt ..	.. 332
Steadman *v.* Hockley ..	.. 31
Stear, Johnson *v.* ..	.. 27
Steele, Swan *v.* ..	.. 331
Steinkeller, Devanx *v.*	.. 89
Steinmitz *v.* Halthin ..	.. 393
Stephens, Edgeberry *v.*	.. 249
——— Hart *v.* ..	.. 391
——— *v.* Olive ..	.. 403
Sterling, Ex parte ..	.. 30
Stevenson *v.* Blakelock	.. 29
——— Toft *v.* ..	.. 420
Steward *v.* Greaves ..	.. 223
Stewart, Hitchman *v.* ..	.. 122
——— Mackinnon *v.*	.. 313
Stickney *v.* Sewell ..	.. 295
Stiff, Cassell *v.* ..	.. 264
Stockdale *v.* Onwhyn ..	.. 96
Stocken *v.* Stocken ..	.. 293
Stocker *v.* Brockelbank	.. 329
Stokes, Brice *v.* ..	.. 306
——— *v.* Holden ..	.. 49
——— *v.* Moor ..	.. 86
Stone *v.* Marsh ..	331, 414
Storie, Long *v.* ..	.. 98

	PAGE
Stoughton, Medina *v.* ..	.. 416
Stovold *v.* Hughes ..	.. 35
Strafford, Lord, Byng *v.*	.. 279
Strang, Berndtson *v.* ..	.. 44
Strathmore, Countess of, *v.* Bowes	.. 399
Stratton *v.* Grymes ..	.. 383
Strawbridge, Souch *v.*	.. 85
Streatfield *v.* Halliday	.. 323
Stretton, Nicholls *v.* ..	96, 97
Stringfield, Pugh *v.* ..	.. 318
Strode *v.* Blackburne ..	.. 12
Strutt, Deeks *v.* ..	.. 6
——— Galsworthy *v.* ..	.. 76
Stuart *v.* Burrowes ..	.. 346
——— Grey *v.* ..	.. 310
Stubbs, Hughes *v.* ..	.. 313
Studdy, Churchward *v.*	.. 21
Sturges, Welchman *v.* ..	.. 370
Sturgis *v.* Champneys ..	.. 392
——— *v.* Darell ..	.. 422
Styles *v.* Guy	.. 306
Styward, Petty *v.* ..	.. 319
Sumner, Gambart *v.* ..	.. 261
Sunbolf *v.* Alford ..	.. 28
Sutton *v.* Buck ..	.. 26
——— *v.* Ennis ..	.. 275
——— Fitch *v.* ..	.. 127
Swallow *v.* Binns ..	.. 290
Swan *v.* Steele ..	.. 331
Swann, Joyce *v.* ..	.. 39
——— *v.* Phillips ..	89, 426
Swans, The case of ..	.. 19
Swanwick *v.* Sothern ..	.. 39
Swayne *v.* Swayne ..	.. 426
Sweet *v.* Benning ..	.. 257
—— *v.* Pym	.. 31
Swift *v.* Swift	.. 405
Swinburne, Craythorne *v.*	.. 122
Swindell, Cullwick *v.* ..	.. 14
Swinnerton, Heming *v.*	.. 194
Swinton, Willoughby *v.*	.. 116
Sworder, Castle *v.* ..	.. 41
Sylvester, Scattergood *v.*	.. 414
Symes, Balch *v.* ..	.. 30
Symonds, Thompson *v.*	.. 261
——— Williams *v.* ..	.. 426
Sympson, Prance *v.* ..	.. 82
Synge, Howe *v.* ..	.. 96

T.

Taggart, Carter *v.* ..	275, 394
Tanner, Brown *v.* ..	.. 66
Tapfield *v.* Hillman ..	.. 33
Tappenden *v.* Burgess	.. 130
Tate *v.* Hilbert ..	340, 341
Tatlock, Peel *v.* ..	.. 123
Tattersall, Kirkpatrick *v.*	.. 81

	PAGE
Taunton, Wood *v.*	205
Taylor *v.* Haygarth	377
——— In re	405
——— Linley *v.*	361
——— *v.* Martindale	208
——— Miller *v.*	256
——— *v.* Pugh	399
——— Tetley *v.*	135
——— *v.* Turnbull	217
——— Wallis *v.*	280
——— Waters *v.*	191
Tebbs *v.* Carpenter	210
Tecsdale, Dickinson *v.* ..	423
Tempest *v.* Tempest	363
Templeton *v.* Warrington ..	290
Tench, Lloyd *v.*	375
Tetley *v.* Taylor	135
Tew, In re	xliv
Teynham, Lord, *v.* Webb ..	286
Thames Iron Works Company *v.* Patent Derrick Company	28
Tharpe *v.* Stallwood	370
Thelluson, Hobson *v.*	54
Thomas *v.* Desanges	157
——— James *v.*	115
——— Owen *v.*	87
——— Sims *v.*	311, 420
——— *v.* Thomas	409
Thomason *v.* Frere	319
Thompson *v.* Dominy	65
——— Farrant *v.*	16
——— *v.* Griffin	293
——— Hill *v.* ..	249, 251
——— Jackson *v.*	176
——— *v.* Lacey	28
——— *v.* Lack ..	123, 324
——— Norman *v.*	127
——— *v.* Pettitt	38
——— *v.* Simpson	288
——— *v.* Spiers ..	425, 426
——— *v.* Symonds	261
——— *v.* Thompson ..	361
Thompson's trusts	49
Thomson *v.* Anderson ..	194
Thorington, Sleech *v.* ..	358
Thorneley, Pierce *v.*	395
Thornton, Lunn *v.*	33
Thorpe, Glynn *v.*	112
——— *v.* Jackson	325
——— Williams *v.* ..	425, 426
Thurlow, Cunynghame *v.* ..	288
Tibbett, Morton *v.*	40
Tidd *v.* Lister	394
Tidswell *v.* Angerstein ..	185
Tipping *v.* Tipping	388
Todd *v.* Wilson	305
Todhunter, Ex parte, In re Norton	170
Toft *v.* Stephenson	420
Tollit *v.* Saunders	205
Tolson *v.* Dykes	180
Tomlin *v.* Mayor of Fordwich	200
Tonnies, Re	161
Topham *v.* Duke of Portland ..	288
——— Duncan *v.*	87
Topp, Saunders *v.*	40
Topping, Ex parte	326
——— *v.* Keysell	141
Townroe, Wightman *v.* ..	328
Townsend *v.* Martin	358
Townshend, Lord, *v.* Windham	388
Travers *v.* Travers	310
Treasury, Lords of the, The Queen *v.*	276
Trimmer *v.* Danby	275
Tripp, Longman *v.*	266
——— Sibree *v.*	127
Trollope *v.* Linton	385
Trotter, Mackintosh *v.* ..	14
Truefit, Perry *v.*	267
Trueman *v.* Fenton	81
Trye *v.* Gloucester, Corporation of	362
Tucker, Hayter *v.*	361
——— In the Goods of ..	347
——— *v.* Laing	123
Tuer *v.* Turner	397
Tugman *v.* Hopkins	400
Tullett *v.* Armstrong ..	401, 402
Tupper, Bamfield *v.*	88
Turby *v.* Bates	39
Turnbull, Godfrey *v.*	238
——— Taylor *v.*	217
Turner, Coles *v.*	134
——— Kidson *v.*	81
——— Tuer *v.*	397
——— *v.* Turner ..	208, 292
——— *v.* Vaughan	95
——— Ward *v.*	35
——— Wood *v.*	341
Turquand *v.* Moss	135
Turton, Maberley *v.*	293
Tutin, Petch *v.*	33
Tutton, Holmes *v.*	126
Twynam, Coope *v.*	122
Twyne's case	50, 80
Tyler *v.* Jones	196
—— *v.* Lake	400
Tyndall, Attorney-General *v.*	362
Tynte *v.* The Queen	48
Tyre, Williams *v.*	240

U.

Union Bank of Manchester, Ex parte, Re Jackson	57, 266, 425

PAGE

Upshaw, Skinner *v.* 28
Usborne, Jenkyns *v.* 44

V.

Valpy, Dickinson *v.* 332
Van *v.* Barnett 301
Van Casteel *v.* Booker .. 44
Vandenbergh *v.* Spooner .. 42
Vandenburg *v.* Palmer .. 35
Vandeputt, Wiseman *v.* .. 44
Vanderhorst, Shewen *v.* .. 422
Van Sandau, Scott *v.*... 195, 199
Vansittart *v.* Vansittart .. 404
Vaughan, Grant *v.* 412
——— Jenkin *v.* 311
——— Pemberton *v.* .. 97
——— Turner *v.* 95
——— Walmsley *v.* .. 286
Vawdry, Cartwright *v.* .. 363
Vawser, Brown *v.* 206
Veal *v.* Veal 340
Venables *v.* East India Company 314
Vere *v.* Ashby.. 331
Vernon, Davies *v.* .. 10, 12, 30
——— Lepard *v.* 415
——— *v.* Smith 188
Vick, Edelston *v.* 267
Viner *v.* Francis 364
Vulliamy *v.* Noble 328

W.

W., H. *v.* 403
Wackerbath, Mollett *v.* .. 94
Wade *v.* Dowling 199
Wadsworth *v.* Smith 194
Wain *v.* Warlters 84
Wainewright, Barclay *v.* .. 274
Wainsford, Warner *v.* .. 370
Waite *v.* Jones 96
——— Jones *v.* 403
Wakefield *v.* Brown 317
——— *v.* Newbon 30
——— Palmer *v.* 398
——— Saunders *v.*.. .. 84
Wales, Leighton *v.* .. 76, 97
Walford, Dyke *v.* 368
Walker *v.* Giles 243
——— *v.* Milne 361
——— *v.* Nevill 135
——— Pendlebury *v.*.. 123, 129
——— *v.* Perkins 95
——— Roberts *v.* 48
——— Woodmeston *v.* .. 401
——— Young, *v.* 201
Wall, Harris *v.*.. 82
Wallace *v.* Auldjo 393

PAGE

Wallace *v.* Woodgate.. .. 28
Wallis, Binnington *v.*.. 79, 96
——— *v.* Day.. 97
——— Fordham *v.* 88
——— *v.* Hodson 375
——— Mason *v.* 198
——— *v.* Taylor 280
Walmesley *v.* Milne 14
Walmsley *v.* Vaughan .. 286
Walrond *v.* Walrond 404
Walsh, Gale *v.*... 91
——— *v.* Wason .. 393, xliv
——— *v.* Whitcomb 124
Walter *v.* Adcock 134
——— *v.* Hodge 340
——— *v.* Macdonald 91
Walter Idle's case 19
Walters, Bevan *v.* 28
Walton, Hitchman *v.*.. 14, 16
——— *v.* Lavater .. 254, 320
Wane, Cumber *v.* 127
Warburton *v.* Hill 216
——— *v.* Sandys .. 304
Ward, Bainton *v.* 282
—— *v.* Beck 60
—— *v.* Byrne 97
—— *v.* Combe.. 274
—— Greenberg *v.* 134
—— Merriman *v.* 128
—— *v.* Penoyre 354
—— *v.* Turner.. 35
—— *v.* Yates 394
Warde, Bristow *v.* 286
——— Dudley *v.* 16
——— In re 298
Warden *v.* Ashburner.. .. 276
Wardroper *v.* Cutfield .. 275
Waring *v.* Lee 286
Warlters, Wain *v.* 84
Warner and Powell's Arbitration, Re 198
——— Mare *v.* 129
——— *v.* Wainsford 370
Warrington, Templeton *v.* .. 290
Warwick, Countess of, Edwards *v.*... .. 276
——— March *v.* 135
——— *v.* Richardson .. 321
Wason, Walsh *v.* .. 393, xliv
Waterfall *v.* Pennistone .. 52
Waterhouse, Close *v.* 29
Waterpark, Young *v.* 285
Waters, Ex parte 155
——— *v.* Taylor 191
Waterworth, Ripley *v.* .. 218
Wathen, Pelly *v.* 30
Watkins, Ex parte, In re Couston xliv
Watmough's trusts, In re .. 362

	PAGE
Watson *v.* Birch	418
——— Jessopp *v.*	375
——— Keightley *v.*	317
——— *v.* Parker	117
——— Willesford *v.*	192
Watt *v.* Watt	400
Watts *v.* Girdlestone	210, 307
—— *v.* Jefferyes	216
—— *v.* Porter	216
—— Reeves *v.*	134
Waugh *v.* Carver	329, 331
——— Edmund *v.*	420
Way *v.* Bassett	325
Way's settlement, Re	312
Weall *v.* Rice	360
Weatherby, Brown *v.*	325
Webb *v.* Fox	166
—— *v.* Grace	383
—— *v.* Hewitt	123
—— *v.* Needham	369
—— Tevnham, Lord, *v.*	286
Webb's Policy, Re	425
Webster *v.* Webster	328
Wegnelin, Rankin *v.*	340
Welchman, In re	393
——— *v.* Sturgis	370
Weld, Graves *v.*	17
Weldon *v.* Gould	29
Welland, Balfour *v.*	301
Wellesley *v.* Beaufort, Duke of	405
——— Earl Cowley *v.*	18
——— *v.* Wellesley	310
Wellington *v.* Mackintosh	191
Wells *v.* Horton	85
Wennall *v.* Adney	81
Wensley, Ex parte	141
West *v.* Berney	287
—— Hartlepool Harbour and Railway Co., Wilson *v.*	222
—— Hebdon *v.*	184
—— *v.* Reid	427
—— *v.* Skip	35
Westland, Wiseman *v.*	12
Westmacott, Harmer *v.*	266
Westmeath, Marquis of, Hindley *v.*	403
Westminster Brymbo Coal and Coke Company Limited, Wheatley *v.*	192
Weston, Foster *v.*	120
Wetherell *v.* Langston	318
——— *v.* Wilson	294
Whale *v.* Booth	353
Whalley, Carter *v.*	328
Wheateroft *v.* Hickman	329
Wheatley *v.* Westminster Brymbo Coal and Coke Company Limited	192
Wheeler, Bushell *v.*	40
——— Doe *d.* Stace *v.*	343
——— Palmer *v.*	288
——— Rex *v.*	250
Wheelhouse *v.* Ladbrooke	116
Wheelwright, Robinson *v.*	401
Wheldale *v.* Partridge	300
Whinery, Minnit *v.*	331
Whinman *v.* Kynman	88
Whitaker, Pain *v.*	27
Whitcomb, Walsh *v.*	124
White, Acton *v.*	402
——— Blake *v.*	123
——— *v.* Grane	294
——— *v.* Spettigue	413
Whitehead *v.* Porter	133
Whitfield *v.* Bewitt	18
Whitmarsh, Regina *v.*	224
Whitmore, Reeve *v.*	34
——— *v.* Smith	199
——— Smith *v.*	202
Whittaker *v.* Howe	97
Whittem *v.* Sawyer	393
Whittingham, In re	407
Whittingstall *v.* Grover	325
Whittle *v.* Henning	397
Whitton, Squire *v.*	123
Whorwood, Cooke *v.*	200
Wier, Ex parte	145
Wigg *v.* Shuttleworth	96
Wightman *v.* Townroe	328
Wilbraham *v.* Snow	24
Wilcox, Kruges *v.*	31
Wild *v.* Clarkson	115
Wilding *v.* Richards	313
Wildman *v.* Wildman	209
Wiles *v.* Gresham	299
Wilkins, Bristead *v.*	217
——— *v.* Bromhead	39
Wilkinson *v.* Adam	363
——— *v.* Byers	127
——— *v.* Candlish	140
——— *v.* Evans	42
——— *v.* Henderson	325
Willesford *v.* Watson	xliv, 192
Willet *v.* Chambers	331
Williams *v.* Burgess	108
——— Clarke *v.*	133
——— Eads *v.*	199
——— *v.* Evans	14
——— Evans *v.*	109
——— Ex parte	293
——— *v.* Frost	246
——— *v.* Hayward	243
——— *v.* Henshaw	316
——— *v.* Lake	84
——— Manders *v.*	26
——— *v.* Moor	82

	PAGE
Williams *v.* Rawlinson ..	128
——— *v.* Smith	413
——— *v.* Symonds ..	426
——— *v.* Thorpe ..	425, 426
——— *v.* Tyre	240
Williamson, Chamberlain *v.* ..	71
Willing *v.* Baine	316
Willis *v.* Black	310
—— *v.* De Castro	324
—— *v.* Hiscox	306, 307
Willomatt, Cooper *v.*	27
Willott, Staniland *v.*	341
Willoughby, Foljambe *v.* ..	294
——— —— *v.* Swinton ..	116
Willows, Spirett *v.*	393
Wills *v.* Hacon	133
Wilmer *v.* Currey	322
Wilmot, Reed *v.*	50
Wilmshurst *v.* Bowker	44, 45
Wilson *v.* Brownsmith ..	358
——— *v.* Hood	31
——— Liverpool Marine Credit Co. *v.*	66
——— Lucas *v.*	202
——— *v.* Piggott ..	285, 286
——— Todd *v.*	305
——— *v.* West Hartlepool Harbour and Railway Co.	222
——— Wetherell *v.*	294
——— *v.* Wilson 66, 306, 403,	404
Wilton *v.* Colvin	309
Wiltshire, Doran *v.*	301
Winan's Patent, Re	250
Winch *v.* Keeley	124
Winchelsea, Earl of, Deering *v.*	122
Windham, Townsend, Lord, *v.*	388
Windle *v.* Andrews	91
Windsor, Lincoln *v.*	306
Winn *v.* Ingilby	16
Winnall, Rudge *v.*	17
Wisden, Page *v.*	259
Wise *v.* Metcalf	73
Wiseman *v.* Vandeputt ..	44
——— *v.* Westland ..	12
Wishart *v.* Fowler	129
Witham, In the Goods of ..	344
Witt *v.* Amis	340
—— Fraser *v.*	44
Wolverhampton New Waterworks Co. *v.* Hawkesford ..	221
Wombwell *v.* Hanrott	285, 286
Wood *v.* Adcock	200
—— Climie *v.*	14
—— *v.* Dixie	54
—— Ex parte	56
Wood, Gomley *v.*	305
—— *v.* Taunton	205
—— *v.* Turner	341
—— *v.* Wood	125
Woodgate, Acton *v.*	313
——— —— Wallace *v.*	28
Woodhead, Cresswick *v.* ..	344
Woodman, Bowyer *v.*	420
Woodmeston *v.* Walker ..	401
Woods *v.* Foote	134
Woolfit, Cooper *v.*	17
Woolley, Jackson *v.* ..	88, 325
Worrall *v.* Jacob	403
Worrell *v.* Johnson	30
Wortham *v.* Pemberton ..	392
Wren *v.* Bradley	403
Wright, Cook *v.*	79
——— Hassall *v.*	256
——— Killby *v.*	134
——— Lomas *v.*	117
——— *v.* Maunder	176
——— *v.* Morley	394
——— Norris *v.*	296
——— Smailes *v.*	204
Wrightson *v.* Bywater ..	200
Wyatt, Roberts *v.*	24
Wynne, Hughes *v.* ..	115, 422

Y.

Yates, Bridge *v.*	316
—— Dixon *v.*	36, 43, 44
—— Sherrington *v.*	391
—— Ward *v.*	394
Yea *v.* Field	10
Yeoman *v.* Bradshaw	117
Young *v.* Axtell	327
——— Ex parte	56
——— *v.* Fernie	247
——— *v.* Fletcher	141
——— Halesham *v.*	331
——— Lee *v.*	299
——— *v.* Matthews	35
——— *v.* Walker	201
——— *v.* Waterpark	285
Younge, Meacher *v.*	293

Z.

Zachary *v.* Shepherd	201
Zwinger *v.* Samuda	36

ERRATA AND ADDENDA.

Page 52, note (*y*)—after *Boyd* v. *Shorrock*, V. C. W., L. Rep., 5 Eq. 72, *add* "as to which see *Begbie* v. *Fenwick*, V. C. M., 19 W. R. 402; *Hawtrey* v. *Butlin*, Q. B., 21 W. R. 633; Law Rep., 8 Q. B. 290."

„ 56, last line but two—*for* "1851," *read* "1861."

„ „ note (*p*)—add a reference to "*Ex parte Watkins, In re Couston*, Law Rep., 8 Ch. Ap. 520."

„ 131, note (*s*)—*for* "s. 294," *read* "s. 194."

„ 192, note (*d*)—after *Willesford* v. *Watson*, V. C. Wickens, Law Rep., 14 Eq. 572, *add* "affirmed on appeal, Law Rep., 8 Ch. Ap. 473."

„ 309, note (*p*)—add "*In re Clinton's Trust*, Law Rep., 13 Eq. 295."

„ 330, note (*h*)—add a reference to "*Ex parte Mills, In re Tew*, Law Rep., 8 Ch. Ap. 569."

„ 393, note (*z*)—after *Walsh* v. *Wason*, L. C. & L. J. M., *add* "Law Rep., 8 Ch. Ap. 482."

PRINCIPLES

OF THE

LAW OF PERSONAL PROPERTY.

INTRODUCTORY CHAPTER.

OF THE SUBJECTS AND NATURE OF PERSONAL PROPERTY.

Real and personal property.

The English law of property is divided into two great branches,—the law of real property, and the law of personal property. The feudal rules, which respected the holding and culture of land, were the elements of the common law of real property; the rules relating to the disposition of goods were the origin of the law of personal property. Such property was anciently of little importance, and its laws were consequently few and simple. It did not, however, escape the ecclesiastical influence which spread so widely in the middle ages; and it has thence derived that subjection to the rules of the civil law by which it is characterized when transmitted by will or distributed on intestacy.

The civil law.

Chattels real.

The division of property into real and personal, though now well recognized, and constantly referred to even in the acts of the legislature, is comparatively of modern date. In ancient times property was divided into *lands, tenements and hereditaments* on the one hand, and *goods*

and chattels on the other. These two last terms appear to be synonymous. In process of time, however, certain estates and interests in land grew up, which were unknown to the ancient feudal system, and could not conveniently be subjected to its rules. Of these the most important were leases for years. Such interests, therefore, were classed among chattels; but as they savoured, as it was said, of the realty, they acquired the name of *chattels real* (*a*). In more modern times, chattels real have been classed, with other chattels, within the division of personal property; but as chattels real, though personal property, are in fact interests in land, the laws respecting them have been noticed in the author's treatise on the Principles of the Law of Real Property (*b*). Chattels real will therefore be only incidentally noticed amongst the subjects treated of in the present work.

Chattels personal.

When leases for years, and other interests in land of the like nature, were admitted into the class of chattels as chattels real, it became necessary that such goods as had previously constituted the whole class, should be distinguished from them by some further name; and the title of *chattels personal* was accordingly applied to all such chattels as did not savour of real estate. For this title, the choice of two reasons is given to the reader by Sir Edward Coke, "because, for the most part, they belong to the person of a man, or else for that they are to be recovered by personal actions" (*c*). The former of these two reasons has been chosen by Mr. Justice Blackstone (*d*). But it is submitted that the latter reason is most probably the true one. When goods and

Reason for the term "personal."

(*a*) Co. Litt. 118 b.

(*b*) Principles of the Law of Real Property, 315 et seq., 1st ed.; 307, 2nd ed.; 322, 4th ed.; 333, 5th ed.; 350, 6th ed.; 357, 7th ed.; 373, 8th ed.; 372, 9th ed.; 375, 10th ed.

(*c*) Co. Litt. 118 b.

(*d*) 2 Black. Com. 16, 384; 3 Black. Com. 144.

chattels began to be called personal, they had become too numerous and important to accompany the persons of their owners. On the other hand, the bringing and defending of actions has always been the most prevailing business of lawyers; from the different natures of actions, the nomenclature of the law is therefore most likely to have proceeded. Now actions were long divided into three classes,—real actions, personal actions, and mixed actions. Real actions were brought for the recovery of lands, and, by their aid, the *real land* was restored to its rightful owner. Mixed actions, as their name imports, were real and personal mixed together. Personal actions were brought in respect of goods for which, as they are in their nature destructible, nothing but pecuniary *damages* could with certainty be recovered from the *person* against whom the action was brought. Accordingly, by the ancient law of England, there never were more than two kinds of personal actions in which there was a possibility of recovering, by the judgment of the Court, the identical goods in respect of which the action was brought. One of these was the action of *detinue*, where goods, having come into a man's possession, were unlawfully detained by him; in which case, however, the judgment was merely conditional, that the plaintiff recover the said goods, or (*if they could not be had*) their respective values, and also the damages for detaining them (*e*). The other was the action of *replevin*, brought for goods which had been unlawfully distrained; but in this case the goods were never beyond the custody of the sheriff, who is an officer of the law, and their safe return could therefore be secured (*f*). Goods therefore seem to have been called personal, because the remedy for their abstraction was against the *person* who had taken them away, or because, in the words of Lord

Actions real, personal, and mixed.

Action of detinue.

Action of replevin.

(*e*) 3 Black. Com. 152.

(*f*) Ibid. 146.

New enactments.

Coke, they were to be recovered by personal actions (*g*). By recent statutes (*h*), however, provision has been made for enforcing the delivery of goods, in actions for their detention or for breach of contract to deliver them for a price in money; and if they cannot be found, all the lands and chattels of the defendant may be distrained till they are delivered.

Chattels personal, then, are the subjects of the present treatise. In ancient times they consisted entirely of moveable goods, visible and tangible in their nature, and in the possession either of the owner or of some other person on his behalf. Nothing of an incorporeal nature was anciently comprehended within the class of chattels personal. In this respect the law of personal property strikingly differs from that of real property, in which, from the earliest times, incorporeal hereditaments occupied a conspicuous place. But although there was formerly no such thing as an incorporeal chattel personal, there existed not unfrequently a right of action, or the liberty of proceeding in the courts of law either to recover pecuniary damages for the infliction of a wrong or the nonperformance of a contract, or else to procure the payment of money due. Such a right was called, in the Norman French of our early lawyers, a *chose* or thing *in action*, whilst moveable goods were denominated *choses in possession*. Choses in action, though valuable rights, had not in early times the ordinary incident of property, namely, the capability of being transferred; for, to permit a transfer of such a right was, in the simplicity of the times, thought to be too great an encouragement to litigation (*i*); and the attempt to make such a transfer involved the guilt of *maintenance* or the

Chose in action.

Maintenance.

(*g*) See Principles of the Law of Real Property, 7.

(*h*) Stats. 17 & 18 Vict. c. 125, s. 78; 19 & 20 Vict. c. 97, s. 2.

(*i*) 10 Rep. 48 a.

maintaining of another person in his suit. It was impossible, however, that this simple state of things should long continue. Within the class of choses in action was comprised a right of growing importance, namely, that of suing for money due, which right is all that constitutes a *debt*. That a debt should be incapable of transfer was obviously highly inconvenient in commercial transactions; and in early times the custom of merchants rendered debts secured by bills of exchange assignable by indorsement and delivery of the bills. But choses in action, not so secured, could only be sued for by the original creditor, or the person who first had the right of action. In process of time, however, an indirect method of assignment was discovered, the assignee being empowered to sue in the name of the assignor; and in the reign of Henry VII. it was determined that a "chose in action may be assigned over for lawful cause as a just debt, but not for maintenance, and that where a man is indebted to me in £20, and another owes him £20 by bond, he may assign this bond and debt to me in satisfaction, and I may justify for suing it *in the name of the other* at my own costs" (*j*). Choses in action, having now become assignable, became an important kind of personal property; and their importance was increased by an act of the following reign (*k*), whereby the taking of interest for money, which had previously been unlawful, was rendered legal to a limited extent. Loans and mortgages soon became common, forming a kind of incorporeal personal property unknown to the ancient law. In the reign of Queen Anne, promissory notes were rendered, by act of parliament, assignable by indorsement and delivery, in the same manner as inland bills of exchange (*l*). More recent statutes have enabled

A debt.

(*j*) Bro. Abr. tit. Chose in Action, pl. 3, 15 Hen. VII. c. 2.

(*k*) Stat. 37 Hen. VIII. c. 9.

(*l*) Stat. 3 & 4 Anne, c. 9, made perpetual by stat. 7 Anne, c. 25, s. 3.

the indorsee of a bill of lading (*m*), and the assignee of a life (*n*) or sea (*o*) policy of insurance, to sue in his own name. But other choses in action continue to this day assignable at law only by empowering the assignee to sue in the name of the assignor.

Equitable choses in action.

In addition to the mass of incorporeal personal property, which now exists in the form of choses in action recoverable by action at law, there exist also equitable choses in action, or rights to be enforced by suit in equity; of these a pecuniary legacy is a familiar instance, for which, if the executor withhold payment, the legatee can maintain no action at law (*p*), but must bring a suit in equity. This kind of chose in action may be assigned directly from one person to another, and the assignee may sue in equity in his own name. For equity, being of more modern origin than the common law, is guided in its practice by rules more adapted to the exigencies of modern society.

Funds, shares, &c.

In modern times also several species of property have sprung up which were unknown to the common law. The funds now afford an investment, of which our forefathers were happily ignorant, whilst canal and railway shares, and other shares in joint stock companies, and patents and copyrights, are evidently modern sources of wealth. These kinds of property are all of a personal nature, many of them having been made so by the acts

(*m*) Stat. 18 & 19 Vict. c. 111, s. 1.

(*n*) Stat. 30 & 31 Vict. c. 144.

(*o*) Stat. 31 & 32 Vict. c. 86.

(*p*) *Deeks* v. *Strutt*, 5 T. Rep. 690; *Braithwaite* v. *Skinner*, 5 Mee. & Wels. 313. Legacies under fifty pounds were recoverable in the county courts, under the acts for the more easy recovery of small debts and demands in England, unless the validity of the bequest were disputed. Stats. 9 & 10 Vict. c. 95, ss. 58, 65; 13 & 14 Vict. c. 61; 19 & 20 Vict. c. 108. These courts have now an equitable jurisdiction, and legacies under five hundred pounds are now recoverable therein. Stats. 28 & 29 Vict. c. 99; 30 & 31 Vict. c. 142.

of parliament under the authority of which they have originated. For want of a better classification, these subjects of personal property are now usually spoken of as *choses in action*. They are, in fact, personal property of an incorporeal nature, and a recurrence to the history of their classification amongst *choses in action* will, as we shall hereafter see, help to explain some of their peculiarities.

How personal property differs from real.

Such is the general outline of the subjects of modern personal property. They are distinguished from real property by being unaffected by the feudal rules of tenure, by being alienable by methods altogether different, by passing in the first instance to the executors, when bequeathed by will, and by devolving, on their owner's intestacy, not on his heir, but on an administrator appointed formerly by the Ecclesiastical Court, but now by the Court of Probate, by whom they are distributed amongst the next of kin of the deceased. On the first of these characteristics, however, mainly depends the nature of the property which exists in things personal. The first lesson to be learned on the nature of real property is this—that of such property there can be no such thing as an absolute ownership; the utmost that can be held or enjoyed in real property is an estate (*q*). There may be an estate for life, or an estate tail, or an estate in fee simple; but, according to the law of England, there cannot exist over landed property any absolute and independent dominion. All the land in the kingdom is the subject of tenure; and if the estate is not holden of any subject, at any rate it must be held of the crown. With regard to personal property, however, the primary rule is precisely the reverse. Such property is essentially the subject of absolute ownership, and cannot be held for any estate. It is true that the

Real property held by estates.

Personal property the subject of absolute ownership.

(*q*) Principles of the Law of Real Property, 16.

phrase *personal estate* is frequently used as synonymous with personal property ; but this general use of the term *estate* should not mislead the student into the supposition that there can be any such thing as an estate in personalty properly so called. The rule that no estate can subsist in personal property would seem to have originated in the nature of such property in early times. Goods and chattels of a personal kind, in other words, moveable articles, then formed, as we have seen, the whole of a man's personal estate. And such articles, it is evident, may be the subjects of absolute ownership, and have not those enduring qualities which would render them fit to be holden by any kind of feudal tenure. As personal property increased in value and variety, many kinds of property of a more permanent nature became, as we have seen, comprised within the class of personal, such as leases for years, of whatever length, and Consolidated Bank Annuities. But the rule that there can be no estate in chattels, the reason of which was properly applicable only to moveable goods, still continues to be applied generally to all sorts of personal property, both corporeal and incorporeal. The consequences of this rule, as we shall hereafter see, are curious and important. But in the first place it will be proper to consider the laws respecting those moveable chattels, or choses in possession, which constitute the most ancient and simple class of personal property; the class, however, which has given to the rest many of the rules for regulating their disposition.

PART I.

OF CHOSES IN POSSESSION.

CHAPTER I.

OF CHATTELS WHICH DESCEND TO THE HEIR.

CHOSES in possession are moveable goods, such as plate, furniture, farming stock, both live and dead, locomotive engines and ships. These, as has been before remarked, are essentially the subjects of absolute ownership, and cannot be held by estates; they are alienable by methods altogether different from those employed for the conveyance of landed property, and they devolve in the first instance on the executor of the will of their owner, or on the administrator of his effects, if he should die intestate. There are, however, some kinds of choses in possession which form exceptions to the general rule: these consist of certain chattels so closely connected with land that they partake of its nature, pass along with it, whenever it is disposed of, and descend along with it, when undisposed of, to the heir of the deceased owner. The chattels which thus form exceptions are the subject of the present chapter: they consist principally of *title deeds*, *heir-looms*, *fixtures*, *chattels vegetable*, and *animals feræ naturæ*. Of each in their order.

Exceptions to the general rule.

Title deeds, though moveable articles, are not strictly speaking chattels. They have been called the sinews of the land (*a*), and are so closely connected with it that they will pass, on a conveyance of the land, without

Title deeds pass by the conveyance of the lands.

(*a*) Co. Litt. 6 a.

being expressly mentioned: the property in the deeds passes out of the vendor to the purchaser simply by the grant of the land itself (*b*). In like manner a devise of lands by will entitles the devisee to the possession of the deeds; and if a tenant in fee simple should die intestate, the title deeds of his lands will descend along with them to his heir at law (*c*). In former times, when warranty was usually made on the conveyance of lands (*d*), the rule was that the feoffor should retain all deeds containing warranties made to himself or to those through whom he claimed, and also all such deeds as were material for the maintenance of the title to the land (*e*). But if the feoffment was made without any warranty, the feoffee was entitled to the whole of the deeds; for the feoffor could receive no benefit by keeping them, nor sustain any damage by delivering them (*f*). Warranties have now fallen into disuse; but the principle of the rule above stated still applies when the grantor has any other lands to which the deeds relate, or retains any legal interest in the lands conveyed; for in either of these cases he has still a right to retain the deeds (*g*). And if the grantor should retain merely an equitable right to redeem the lands, as in the case of a mortgage in fee simple, it has been said that this equitable right is a sufficient interest in the lands to authorize him to withhold the deeds, unless they are expressly granted to the mortgagee (*h*). It is very questionable, however,

(*b*) *Harrington* v. *Price*, 3 Barn. & Adol. 170; *Philips* v. *Robinson*, 4 Bing. 106; S. C. 12 Moore, 308.

(*c*) Wentworth's Office of an Executor, 14th ed. 153; Williams on Executors, pt. 2, book 2, c. 3, s. 3.

(*d*) See Principles of the Law of Real Property, 344, 1st ed.; 346, 2nd ed.; 365, 4th ed.; 376, 5th ed.; 399, 6th ed.; 407, 7th ed.; 426, 8th ed.; 423, 9th ed.; 426, 10th ed.

(*e*) *Buckhurst's case*, 1 Rep. 1 b.

(*f*) 1 Rep. 1 a.

(*g*) Bro. Abr. tit. Charters de Terre, pl. 53; *Yea* v. *Field*, 2 T. Rep. 708; see however Sugd. Vend. & Pur. 367, 13th ed.; 2 Prest. Conv. 466.

(*h*) *Davies* v. *Vernon*, 6 Q. B. 443, 447.

whether a legal right ought to be attached to an interest merely equitable. And the doctrine last mentioned is opposed by more recent decisions in another court (*i*).

When the conveyance is by way of use.

If a conveyance of lands should be made by way of use, thus, if lands should be granted to A. and his heirs to the use of B. and his heirs, it has been said that the title deeds of the land will belong to A., the grantee; because, although the Statute of Uses (*k*) conveys the legal estate in the lands from A. to B., it does not affect the title deeds, which must consequently still remain vested in A. (*l*). But this doctrine has been justly questioned, on the ground that the legislative conveyance from A. to B., effected by the Statute of Uses, ought to be at least as powerful as the common law conveyance of the lands to A.; and if the latter conveyance can carry with it the deeds relating to the land, the former conveyance should be considered as powerful enough to do the same (*m*); and it has accordingly been so decided in a case in Ireland (*n*).

When the lands are settled.

The tenant of an estate in fee simple in lands possesses the highest interest which the law of England allows to any subject; and such a tenant possesses also an absolute property in the title deeds, which he may destroy at his pleasure, or sell for the value of the parchment (*o*). But if the lands to which deeds relate should be settled on any person for life or in tail, a qualified ownership will arise with respect to the deeds, different in its nature from that simple property which is usually held in chattels personal. As the lands are now held for a limited estate, so a limited interest in the deeds

(*i*) *Goode* v. *Burton*, 1 Exch. Rep. 189; *Newton* v. *Beck*, 3 H. & N. 220.

(*k*) 27 Hen. VIII. c. 10.

(*l*) 1 Sand. Uses, 4th ed. 119; 5th ed. 117.

(*m*) Sugd. Vend. & Pur. 366, 13th ed.; Co. Litt. 6 a, n. (4).

(*n*) *Malone* v. *Minoughan*, 14 Ir. Com. Law Rep. 540, dissentiente Hayes, J.

(*o*) Cro. Eliz. 496.

belongs to the tenant. The tenant for life or in tail, when in possession of the lands, being the freeholder for the time being, is entitled also to the possession of the deeds (*p*); whereas the tenant for a mere term of years of whatever length, not having the freehold or feudal possession of the lands, has no right to deeds which relate to such freehold (*q*); although deeds relating only to the term belong to such a tenant, and will pass, without any express grant, to the assignee of the term (*r*). The tenant for life or in tail in possession, though entitled to the possession or custody of the deeds which relate to the inheritance, has no right to injure or part with them (*s*): he has an interest in the title deeds correspondent only to his estate in the lands; and if he should part with the deeds, even for a valuable consideration, the remainder-man, on coming into possession of the lands, will nevertheless be entitled to the possession of the deeds, just as if the tenant for life or in tail had kept them in his own custody (*t*).

Heir-looms.

Heir-looms, strictly so called, are now very seldom to be met with. They may be defined to be such personal chattels as go, by force of a *special custom*, to the heir, along with the inheritance, and not to the executor or administrator of the last owner (*u*). The owner of an heir-loom cannot by his will bequeath the heir-loom, if he leave the land to descend to his heir; for in such a

(*p*) *Ford* v. *Peering*, 1 Ves. jun. 76; *Strode* v. *Blackburne*, 3 Ves. 225; *Garner* v. *Hannyngton*, 22 Beav. 627; *Allwood* v. *Heywood*, Exch. 11 W. R. 291; 1 Hurlst. & Colt. 745.

(*q*) *Churchill* v. *Small*, 8 Ves. 323; *Harper* v. *Faulder*, 4 Mad. 129, 138; *Wiseman* v. *Westland*, 1 You. & Jer. 117; *Hotham* v. *Somerville*, 5 Beav. 360.

(*r*) *Hooper* v. *Ramsbottom*, 6 Taunt. 12.

(*s*) Bro. Abr. tit. Charters de Terre, pl. 36. As to production see *Davies* v. *Earl of Dysart*, 20 Beav. 405.

(*t*) *Davies* v. *Vernon*, 6 Q. B. 443; *Easton* v. *London*, Exch. 12 W. R. 53; 33 L. J., Exch. 34.

(*u*) See Co. Litt. 18 b.

case the force of the custom will prevail over the bequest, which, not coming into operation until after the decease of the owner, is too late to supersede the custom (*x*). According to some authorities heir-looms consist only of bulky articles, such as tables and benches fixed to the freehold (*y*); but such articles would more properly fall within the class of fixtures, of which we shall next speak. The ancient jewels of the crown are heir-looms (*z*). And if a nobleman, knight or esquire be buried in a church, and his coat armour or other ensigns of honor belonging to his degree be set up, or if a tombstone be erected to his memory, his heirs may maintain an action against any person who may take or deface them (*a*). The boxes in which the title deeds of land are kept are also in the nature of heir-looms, and will belong to the heir or devisee of the lands; for such boxes "have their very creation to be the houses or habitations of deeds" (*b*); and accordingly a chest made for other uses will belong to the executor or administrator of the deceased, although title deeds should happen to be found in it. In popular language the term "heir-loom" is generally applied to plate, pictures or articles of property which have been assigned by deed of settlement or bequeathed by will to trustees, in trust to permit the same to be used and enjoyed by the persons for the time being in possession, under the settlement or will, of the mansion-house in which the articles may be placed. Of this kind of settlement more will be said hereafter.

Crown jewels.

Coat armour.

Tombstone.

Deed boxes.

Popular use of the term "heir-loom."

Fixtures are such moveable articles or chattels personal as are fixed to the ground or soil, either directly, or indirectly by being attached to a house or other

Fixtures.

(*x*) Co. Litt. 185 b.

(*y*) Spelman's Glossary, voce Heir-Loom. See Williams on Executors, pt. 2, bk. 2, ch. 2, s. 3.

(*z*) Co. Litt. 18 b.

(*a*) Ibid.

(*b*) Wentworth's Office of an Executor, 157, 14th ed.

building. The ancient common law, regarding land as of far more consequence than any chattel which could be fixed to it, always considered everything attached to the land as part of the land itself,—the maxim being *quicquid plantatur solo, solo cedit* (*c*). Hence it followed that houses themselves, which consist of aggregates of chattels personal (namely, timber and bricks) fixed to the land, were regarded as land, and passed by a conveyance of the land without the necessity of express mention; and this is the case at the present day (*d*). So now, a conveyance of a house or other building, whether absolutely or by way of mortgage, will comprise all ordinary fixtures, such as stoves, grates, shelves, locks, &c. (*e*), and also fixtures erected for the purposes of trade (*f*), without any express mention, unless an intention to withhold the fixtures can be gathered from the context (*g*). So on the decease of a tenant in fee simple, the devisee of a house, or the heir at law in case of intestacy, will be entitled generally to the fixtures set up in it (*h*). The ancient rule respecting fixtures has been greatly relaxed in favour of tenants for terms of years, who are now permitted to remove articles set up by them for the purposes of trade or of ornament or domestic convenience (*i*), provided they remove them before the

Fixtures of tenants for years.

(*c*) See 4 Rep. 64 a; 1 Lord Raymond, 738; *Mackintosh* v. *Trotter*, 3 Mee. & Wels. 184, 186; Williams on Executors, pt. 2, bk. 2, ch. 3, s. 2.

(*d*) See Principles of the Law of Real Property, 13.

(*e*) *Colegrave* v. *Dias Santos*, 2 Barn. & Cress. 76; S. C. 3 Dowl. & Ry. 255; *Longstaff* v. *Meagoe*, 2 Ad. & Ell. 167; *Hitchman* v. *Walton*, 4 Mee. & Wels. 409; *Ex parte Barclay*, 5 De G., M. & G. 403; *Mather* v. *Fraser*, 2 Kay & John. 536; *Williams* v. *Evans*, 23 Beav. 239; *Walmesley* v. *Milne*, 7 C. B., N. S. 115; *Metropolitan Counties, &c. Society* v. *Brown*, 26 Beav. 454.

(*f*) *Cullwick* v. *Swindell*, M. R., L. Rep., 3 Eq. 249; *Climie* v. *Wood*, Law Rep., 3 Exch. 257; *Longbottom* v. *Berry*, L. Rep., 5 Q. B. 123.

(*g*) *Hare* v. *Horton*, 5 Barn. & Adol. 715.

(*h*) Shep. Touch. 470.

(*i*) *Grymes* v. *Boweren*, 6 Bing. 437.

expiration of their tenancy (*j*). But the old rule still prevails with regard to agricultural fixtures, which, though set up by the tenant, become, by being fixed to the soil, the property of the landlord (*k*); unless they are put up with the consent *in writing* of the landlord for the time being, in which case it is provided by an act of the present reign (*l*) that they shall be the property of the tenant, and shall be removable by him on giving to the landlord or his agent one month's previous notice in writing of his intention so to do, subject to the landlord's right to purchase the same by valuation in the manner provided by the act. This act extends to farm buildings either detached or otherwise, and to engines and machinery, either for agricultural purposes or for the purposes of trade and agriculture, although built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition as the same were in before the erection of anything so removed. A relaxation of the old rule has also been made in favour of the executors of a tenant for life, who appear to be allowed to remove fixtures set up by their testator for the purposes of trade or of ornament or domestic convenience (*m*). But the rule of the common law still retains much of its force as between the devisee or heir of a tenant in fee simple and his executor or administrator. Thus a tenant for years may remove ornamental chimney-pieces set up by him during his tenancy (*n*); but if erected by a tenant in fee simple, they will pass with the house to the devisee

Agricultural fixtures.

Fixtures of tenant for life.

Fixtures of tenant in fee.

(*j*) *Lyde* v. *Russell*, 1 Barn. & Adol. 394; *Leader* v. *Homewood*, 5 C. B., N. S. 546; *Pugh* v. *Arton*, V.-C. M., L. Rep., 8 Eq. 626.

(*k*) *Elwes* v. *Maw*, 3 East, 38.

(*l*) Stat. 14 & 15 Vict. c. 25, s. 3.

(*m*) *Lawton* v. *Lawton*, 3 Atk. 14. See *D'Eyncourt* v. *Gregory*, M. R., 36 Law Journ., N. S. 107; L. Rep., 3 Eq. 382.

(*n*) *Bishop* v. *Elliot*, Ex. Ch., 1 Jur., N. S. 962; 24 Law J., Exch. 229; 11 Ex. Rep. 113.

or heir (*o*). So machinery employed in carrying on iron works or collieries may be removed by a lessee for years, if erected by him; but if erected by a tenant in fee simple, such machinery, even though removable without injury to the freehold, will belong to the heir or the devisee of the land (*p*). However it seems that pier glasses, fixed by nails, and not let into panels, and hangings fastened up for ornament, will now belong to the executor or administrator of a tenant in fee simple as part of his personal estate (*q*).

When fixtures are demised.

Where fixtures are demised to a tenant along with the house, mill or other building in which they may happen to be, the property in the fixtures still remains in the landlord, subject to the tenant's right to the possession and use of them during his term (*r*); and if they should be severed from the building by the tenant or any other person, or should be separated by accident, the landlord will acquire an immediate right to the possession of them (*s*). In this respect they are subject to the same rules as timber, which, as we shall see, is equally a part of the inheritance until severed, and when cut becomes the personal property of the owner of the fee. Fixtures, which would descend with the house or building to the heir of the owner of the fee on intestacy, are not in fact his goods and chattels properly so called (*t*).

Chattels vegetable.

Chattels vegetable consist, as their name imports, of moveable articles of a vegetable origin, such as timber, underwood, corn and fruit. All these articles, so long

(*o*) *Dudley* v. *Warde*, Amb. 113.

(*p*) *Fisher* v. *Dixon*, 12 Cl. & Fin. 312.

(*q*) *Cave* v. *Cave*, 2 Vern. 508; *Squire* v. *Mayor*, 2 Eq. Ca. Abr. 430, pl. 7; S. C. 2 Freem. 249.

(*r*) *Boydell* v. *M'Michael*, 1 Cro. Mee. & Rosc. 177; *Hitchman* v. *Walton*, 4 Mee. & Wels. 409.

(*s*) *Farrant* v. *Thompson*, 5 Barn. & Ald. 826.

(*t*) *Winn* v. *Ingilby*, 5 Barn. & Ald. 625.

as they remain unsevered from the land, are for many purposes considered as part of it; and they will pass by a conveyance or devise of the land without express mention (*u*). If, however, the trees should be expressly excepted out of the conveyance, they will remain the personal property of the grantor, although severed only in contemplation of law (*x*); and in like manner the trees alone may be granted by a tenant in fee simple, and will then form the personal property of the grantee, even before they are cut down (*y*). But if a tenant of lands in fee simple should die without having sold or devised them (*z*), the law then draws a distinction between such vegetable products as are the annual results of agricultural labour, and such as are not. The former class are called by the name of *emblements*, and the right to reap them belongs to the executor or administrator of the deceased in exclusion of the heir (*a*); whilst the latter class descend to the heir along with the land. The reason of the distinction appears to be, that as annual crops are mainly the result of labour incurred at the expense of the owner's personal estate, his personal estate ought to reap the benefit of the crop which results (*b*). Accordingly crops of corn, and grain of all kinds, flax, hemp, and everything yielding an artificial annual profit produced by labour, belong to the executor or administrator, as against the heir; whilst timber, fruit trees, grass, and clover, which do not repay within the year the labour by which they are produced, belong to the heir as part of the land (*c*). The right to emblements also belongs to the executor or administrator of

Emblements.

(*u*) Com. Dig. tit. Biens (H).

(*x*) *Herlakenden's ease*, 4 Rep. 63 b.

(*y*) Wentworth's Office of an Executor, 14th ed. 148; Williams on Executors, pt. 2, bk. 2, ch. 2, sect. 2.

(*z*) As to a devisee, see *Rudge* v. *Winnall*, 12 Beav. 357; *Cooper* v. *Woolfit*, 2 Hurl. & Norm. 122.

(*a*) Com. Dig. tit. Biens (G).

(*b*) Wentworth's Office of an Executor, 14th ed. 147.

(*c*) See *Graves* v. *Weld*, 5 Barn. & Adol. 105; S. C. 2 Nev. & Man. 725.

a tenant for life (*d*), and to a tenant at will if dismissed from his tenancy before harvest (*e*). The claims of tenants at rack rent, whose tenancies may determine by the death or cesser of the estate of tenants for life, or for any other uncertain interest, are now provided for by a recent enactment, giving the tenants at rack rent a right to continue to hold until the expiration of the current year of their tenancy (*f*).

When lands are let for years or life.

When lands are let to a tenant for years or for life, if no exception is made of the timber, the property in the timber will still remain in the owner of the inheritance, subject to the tenant's right to have the mast and fruit growing upon it, and the loppings for fuel, and the benefit of the shade for his cattle (*g*). Accordingly all fruit which may be plucked, or bushes or trees, not being timber, which may be cut or blown down, will belong to the tenant (*h*); but timber trees, which may be cut or blown down, will immediately become the property of the owner of the first estate of inheritance in the land, whether in fee simple or in tail (*i*). Timber trees are oak, ash, and elm in all places; and in some particular parts of the country, by local custom, where other trees are generally used for building, they are for that reason considered as timber (*k*). But if the tenant

Timber trees.

(*d*) Principles of the Law of Real Property, 24, 2nd ed.; 25, 3rd & 4th eds.; 27, 5th, 6th, 7th, 8th, 9th and 10th eds.

(*e*) *Ibid.* p. 310, 2nd ed.; 325, 4th ed.; 336, 5th ed.; 353, 6th ed.; 360, 7th ed.; 376, 8th ed.; 373, 9th ed.; 376, 10th ed.

(*f*) Stat. 14 & 15 Vict. c. 25, s. 1. See Principles of the Law of Real Property, p. 25, 3rd & 4th eds.; 27, 5th, 6th, 7th, 8th, 9th and 10th eds.

(*g*) *Lilford's case*, 11 Rep. 48 b.

(*h*) *Channon* v. *Patch*, 5 Barn. & Cress. 897; S. C. 8 Dowl. & Ry. 651; *Berriman* v. *Peacock*, 9 Bing. 384; S. C. 2 Moo. & Scott, 524; *Pidgley* v. *Rawling*, 2 Coll. 275.

(*i*) *Herlakenden's case*, 4 Rep. 63 a; *Whitfield* v. *Bewitt*, 2 P. Wms. 240; 3 P. Wms. 268; *Lushington* v. *Boldero*, 15 Beav. 1. See, however, *Earl Cowley* v. *Wellesley*, M. R., 1 Law Rep. Eq. 656, qu.?

(*k*) 2 Black. Com. 281.

should be a tenant *without impeachment of waste* (*sine impetitione vasti*), timber cut down by him in a husbandlike manner will become his own property when actually severed (*l*), but not before (*m*); for the words "without impeachment of waste" imply a release of all *demands* in respect of any waste which may be committed (*n*). If, however, the words should be merely *without being impleaded for waste*, the property in the trees when cut would still remain in the landlord, and the action only would be discharged, which he might otherwise have maintained against the tenant for the waste committed by the act of felling the timber (*o*).

Tenant without impeachment of waste.

Animals *feræ naturæ*, or wild animals, including game, are exceptions from the rules which relate to other moveables, on the ground that until they are caught there is no property in them. If therefore the owner of land in fee simple should die, the game on his land, or the fish in any river or pond upon the land, will not belong to his executor or administrator (*p*). And if a man should have a park or warren, he has no true property in the deer, conies, pheasants, or partridges; but they belong to him only "*ratione privilegii* for his game and pleasure so long as they remain in the privileged place" (*q*). But a property in wild animals may be obtained by reclaiming or catching them (*propter industriam*), or by reason of their being unable to get away (*propter impotentiam*) (*r*). Thus deer, even though in a legal park, may be so tame and reclaimed

Animals *feræ naturæ*.

(*l*) *Lewis Bowles' case*, 11 Rep. 82 b. See Principles of the Law of Real Property, 23, 2nd ed.; 24, 3rd & 4th eds.; 25, 5th, 6th, 7th, 8th, 9th and 10th eds.

(*m*) *Cholmeley* v. *Paxton*, 3 Bing. 207; 10 Barn. & Cress. 564.

(*n*) 11 Rep. 82 b.

(*o*) *Walter Idle's case*, 11 Rep. 83 a.

(*p*) Co. Litt. 8 a; *The case of Swans*, 7 Rep. 17 b.

(*q*) 7 Rep. 17 b; Year Book, 4 Hen. VI. 55 b, 56 a; F. N. B. 87, n. (*a*).

(*r*) 2 Black. Com. 391, 394; Williams on Executors, pt. 2, bk. 2, ch. 2, sect. 1.

as to pass to the executors of the owner of the park on his decease (*s*); so rabbits in a hutch, fish in a box, and young pigeons in a dove house, unable to fly, will belong to the executor or administrator of the owner, and not to his heir. It appears to have been formerly thought that hawks and hounds were not subjects of personal property, but would descend with the lands to the heir; but this opinion is not now law. "For," observes the author of the Office of an Executor (*t*), "although they be for the most part but things of pleasure, *that* hindereth not but they may be valuable as well as instruments of music, both tending to delight and exhilarate the spirits; a cry of hounds hath to my sense more spirit and vivacity than any other music."

Hawks and hounds.

Right to kill and take game.

The occupier of land for the time has now the sole right of killing and taking the game upon the land, unless such right be reserved to the landlord or any other person (*u*). Where the landlord has reserved to himself the right of killing game, he may authorize any person or persons, who shall have obtained certificates, to enter upon the land for the purpose of pursuing and killing game thereon (*x*). And the lord of any manor or reputed manor has the right to pursue and kill the game upon the wastes or commons within the manor, and to authorize any other person or persons, who shall have obtained certificates, to enter upon such wastes or commons for the same purpose (*y*).

Property in game.

When game or other wild animals were killed on any land by any other person than the rightful owner, the

(*s*) *Morgan* v. *The Earl of Abergavenny*, 8 C. B. 678.

(*t*) Wentworth's Office of an Executor, 143, 14th ed. The author of this work is supposed to have been Mr. Justice Doddridge.

(*u*) Stat. 1 & 2 Will. IV. c. 32. See as to hares, stat. 11 & 12 Vict. c. 29.

(*x*) Stat. 1 & 2 Will. IV. c. 32, s. 11.

(*y*) Sect. 10.

law, with respect to the property in the game, was formerly as follows: If a man started any game within his own grounds and followed it into another's, and killed it there, the property remained in himself. And so if a stranger started game in one man's chase or free warren, and hunted it into another liberty, the property continued in the owner of the chase or warren; this property arising from privilege, and not being changed by the act of a mere stranger. Or if a man started game on another's private grounds, and killed it there, the property belonged to him on whose ground it was killed. Whereas, if, after being started there, it was killed in the grounds of a third person, the property belonged not to the owner of the first ground, because the property was local; nor yet to the owner of the second, because it was not started in his soil; but it vested in the person who started and killed it, though guilty of a trespass against both the owners (*z*). And this appears to be still the law with respect to wild animals which are not game (*a*). But with respect to game an alteration appears to have been made by the last Game Act (*b*), which seems to vest the property in game killed on any land by strangers, in the person having the right to kill and take the game upon the land (*c*).

(*z*) 2 Bl. Com. 419; *Churchward* v. *Studdy*, 14 East, 249.

(*a*) See *Blades* v. *Higgs*, 12 C. B., N. S. 501; 13 C. B., N. S. 844; 11 Jur., N. S. 701.

(*b*) Stat. 1 & 2 Will. IV. c. 32.

(*c*) Sect. 36. *Rigg* v. *Earl of Lonsdale*, 1 H. & N. 923.

CHAPTER II.

OF TROVER, BAILMENT AND LIEN.

HAVING now considered those moveable articles of property which form exceptions to the rules by which chattels personal are in general governed, let us proceed to notice some circumstances in which chattels personal may be placed, so as to form not real but apparent exceptions to the primary rule already noticed (*a*), that personal property is essentially the subject of absolute ownership, and cannot be held for any *estate*. The property in goods can only belong to, or be vested in, one person at one time: in this respect it resembles the seisin or feudal possession of lands (*b*). Lands, however, may be so conveyed that several persons may possess in them, at the same time, several distinct vested *estates* of freehold, one of them being in possession, and the others in remainder, or the last perhaps being in reversion (*c*). But the law knows no such thing as a remainder or reversion of a chattel. It recognizes only the simple *property* in goods, coupled or not with the right of immediate possession. This simple principle of law, if carefully borne in mind, will serve to explain many points which would otherwise appear difficult or even contradictory. It must be remembered, however, that it does not strictly apply to the moveable articles noticed in our first chapter, which, from their connection with the land,

Property in goods.

(*a*) *Ante*, p. 7.

(*b*) See Principles of the Law of Real Property, 111, 2nd ed.; 116, 3rd & 4th eds.; 121, 122, 5th ed.; 127, 128, 6th ed.; 130, 131, 7th ed.; 136, 8th and 9th eds.; 137, 10th ed.

(*c*) *Ibid.* p. 198, 2nd ed.; 206, 4th ed.; 215, 5th ed.; 225, 6th ed.; 234, 7th ed.; 241, 8th ed.; 240, 9th ed.; 242, 10th ed.

are often governed by the principles of real, rather than those of personal property.

1. When the property in goods is coupled with the possession of them, the ownership is of course complete. This is the common and usual case of the ownership of chattels personal: the owner knows that the goods are his own, and in his own possession, and that is sufficient for him. Circumstances may, however, arise to change this state of things. An article may be lost. In this case the owner still retains his property in the thing, but he has lost the possession of it. The property, however, which still remains in him, entitles him to the possession of the article, whenever he can meet with it; or, in legal phraseology, the property draws with it the right of possession (*d*). If therefore another person should find the article lost, he will have no right to convert it to his own use, if he has any means of knowing to whom it belonged, but must on demand deliver it up to the rightful owner, in whom the property is already vested. If he should refuse to do so, such refusal will argue that he claims it as his own, and will accordingly be evidence of a conversion of the thing to his own use (*e*). For the wrong or *trespass* thus committed, a specific remedy has been provided by the law, in the shape of an action of *trover and conversion*, or more shortly an action of *trover*, which is one of those actions comprised within the technical class of *trespass on the case*. The word *trover* is from the French *trouver*, to find; and the word *conversion* is added, from the conversion of the goods to the use of the defendant being the gist of the action thus brought against him. That the defendant should have found the article lost is not his fault, but his conversion of it to his own use is a trespass, and renders him liable

Where an article is lost.

Action of trover and conversion.

(*d*) 2 Wms. Saunders, 47 a.
(*e*) *Ibid.* 47 e; *Agar* v. *Lisle*, Hob. 187; Bac. Abr. tit. Trover (B).

to the action we are now considering. This action accordingly is now constantly brought to recover damages for withholding the possession of goods whenever they have been wrongfully converted by the defendant to his own use, without regard to the means, whether by finding or otherwise, by which the defendant may have become possessed (*f*). This action can be maintained only when the plaintiff has been in possession of the goods (*g*), or has such a property in them as draws to it the right to the possession. If the goods have been wrongfully converted by the defendant to his own use, the plaintiff will succeed, if he should prove either way his own right to the immediate possession of the goods (*h*); if he should not prove such right, he will fail (*i*). The property in the goods is that which most usually draws to it the right of possession; and the right to maintain an action of trover is therefore often said to depend on the plaintiff's *property* in the goods; the right of immediate possession is also sometimes called itself a special kind of property (*k*); but these expressions should not mislead the student. The action of trover tries only the right to the immediate possession, which, as we shall now see, may exist apart from the *property* in the goods.

If the finder should be deprived, he may maintain *trover*.

For let us suppose that the finder of the article lost, whilst ignorant of the true owner, should have been wrongfully deprived of it by a third person. In this

(*f*) 3 Black. Com. 153; stat. 15 & 16 Vict. c. 76, s. 49, sched. (B) 28.

(*g*) *Addison* v. *Round*, 4 Ad. & Ell. 799; S. C. 6 Nev. & Man. 422; *Brooke* v. *Mitchell*, 6 N. C. 349; S. C. 8 Scott, 739.

(*h*) *Wilbraham* v. *Snow*, 2 Saund. 47; *Armory* v. *Delamirie*, 1 Str. 505; *Roberts* v. *Wyatt*, 2 Taunt. 268; *Legg* v. *Evans*, 6 Mee. & W. 36; Stephen on Pleading, 354, 5th ed.

(*i*) *Gordon* v. *Harper*, 7 T. Rep. 9; *Ferguson* v. *Cristall*, 5 Bing. 305; *Leake* v. *Loveday*, 4 Man. & Gr. 972; *Bradle* v. *Copley*, 1 C. B. 685.

(*k*) *Rogers* v. *Kennay*, 9 Q B. 592.

case the owner being absent, the finder is evidently entitled to the possession of the thing; and he will accordingly succeed in an action of trover brought by him against the wrong-doer (*l*). Here the property in the thing which was lost evidently belongs still to the original owner; but the right of possession is in the finder, until the owner makes his appearance. The owner's property then draws with it the right of possession; and should the finder convert the article found to his own use, he in his turn will be liable to an action of *trover* in respect of the owner's right of possession. Thus, so far as we have already proceeded, we have found nothing more than a simple property in goods, existing with or without the right of possession. The action of *trover* tries the right of possession, and may or may not determine the property. For, strange as it may appear, there is no action in the law of England by which the property either in goods or lands is alone decided.

Bailment.

2. But the article in question, instead of being lost and found, may become the subject of *bailment*. Bailment is defined by Sir William Jones, in his admirable and classical Treatise on the Law of Bailment (*m*), to be a delivery of goods in trust, on a contract expressed or implied that the trusts shall be duly executed, and the goods redelivered as soon as the trust or use for which they were bailed shall have elapsed or be performed. The term *bailment* is derived from the French word *bailler*, to deliver. The person who delivers the goods is called the bailor; the person to whom they are delivered the bailee. The trusts on which goods may be delivered are various. The principal are the following. They may merely be lent to a friend, or left in the cus-

(*l*) *Armory* v. *Delamirie*, 1 Str. 505; 1 Smith's Leading Cases, 151; *Bridges* v. *Hawkesworth*, 15 Jur. 1079. See *Buckley* v. *Gross*, 3 Best & Smith, 566; *Bourne* v. *Fosbrooke*, 18 C. B., N. S. 515.

(*m*) P. 117.

tody of a warehouseman or wharfinger, or they may be entrusted to a carrier to convey to a distance, or to an agent or factor to sell; or they may be pawned for money lent, with or without a power to sell them (*n*), or let out to hire (*o*). In all cases of bailment, however, the simple rule still holds, that the *property* in goods can belong to one party only; and when any goods are *bailed*, the property still remains in the bailor (*p*). The possession of the goods, however, is evidently for the time being with the bailee. But if, while goods are in bailment, a third person should become possessed of them, and should wrongfully convert them to his own use, the right to recover possession will in some degree depend upon the nature of the bailment.

Property remains in the bailor.

Simple bailment.

If the bailment should be what is called a *simple bailment*, as in the four first instances above mentioned, that is, a bailment which does not confer on the bailee a right to exclude the bailor from possession, in such a case either the bailee or the bailor may maintain an action of trover against the wrong-doer (*q*). The bailee may maintain this action, because the action depends only on the right to the possession which the bailee has by virtue of the bailment made to him (*r*); and the bailor may also maintain the action, because his property in the goods draws with it the right of possession, and the bailment is not of such a kind as to vest this right in the bailee solely. The bailee is rather in the situation of servant to the bailor, and the possession of the one is equivalent in construction of law to the possession of the other. But as it would be unjust that the wrong-doer should

Bailee or bailor may maintain trover.

(*n*) See *Pigot* v. *Cubley*, 15 C. B., N. S. 701. The law with respect to pawnbrokers is now contained in the Pawnbrokers Act, 1872, stat. 35 & 36 Vict. c. 93.

(*o*) See *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 912.

(*p*) *Franklin* v. *Neate*, 13 Mee. & W. 481.

(*q*) *Nicholls* v. *Bastard*, 2 C. M. & R. 659; *Manders* v. *Williams*, 4 Exch. Rep. 339.

(*r*) *Sutton* v. *Buck*, 2 Taunt. 302.

pay damages twice over for his offence, the recovery of damages either by bailee or bailor deprives the other of his right of action (*s*). If, however, the bailment should not be of the simple kind, but should confer on the bailee the right to exclude the bailor from the possession, here, though the property in the goods still remains in the bailor, the bailee alone can maintain an action of trover against any person who may have taken the goods and converted them to his own use. Thus the pawnee or hirer of goods can alone maintain an action of trover so long as the pawning or hiring continues (*t*). Here again we have the property in the goods still vested in one person, the bailor, drawing with it, in the case of simple bailment, the right to the possession, and, in the case of other bailments, temporarily disconnected from that right. If, however, any bailee, whatever be the nature of his bailment, should convert the goods bailed to him to his own use, he will by that act have determined the bailment: the property in the bailor will draw to it the right to immediate possession, and the bailor may accordingly recover damages for the act by an action of trover (*u*).

Pawnee or hirer can alone maintain trover.

3. The last case requiring notice in which goods may be in the possession of a person who has no property in them is the case of the existence of a *lien* on the goods. A lien is the right of a person in the possession of goods to retain them until a debt due to him has been satisfied (*v*). A lien is either *particular* or *general*. A particular lien is a right to retain the particular goods in

Lien.

Particular or general.

(*s*) Bac. Abr. tit. Trover (C).

(*t*) *Gordon* v. *Harper*, 7 T. R. 9; *Burton* v. *Hughes*, 2 Bing. 173; *Ferguson* v. *Cristall*, 5 Bing. 305; *Pain* v. *Whitaker*, Ry. & Moo. 99.

(*u*) *Cooper* v. *Willomatt*, 1 C. B. 672; *Johnson* v. *Stear*, 15 C. B., N. S. 330; *Pigot* v. *Cubley*, 15 C. B., N. S. 701.

(*v*) 2 East, 235; 2 Rose, 357; Smith's Compendium of Mercantile Law, 534, 5th ed.; 563, 6th ed.

respect of which the debt arises. A general lien is a right to retain goods in respect of a general balance of an account. The former kind of lien is favoured in law; but the latter, having a tendency to prefer one creditor above another, is taken strictly (*x*). A particular lien is given by the common law over goods which a person is compelled to receive; thus carriers (*y*) and innkeepers (*z*) have a lien on the goods in their care; although an innkeeper cannot detain his guest's person, or take his coat off his back, to secure payment of his bill (*a*). A particular lien is also given by law to every person who by his labour or skill has improved or altered an article entrusted to his care: thus a miller has a lien on the flour he has ground for the cost of grinding (*b*); and a shipwright has a lien on a ship entrusted to him to repair for the costs of repairing it (*c*). So a lien may be claimed for training a horse, because he is improved by the labour and skill thus bestowed upon him (*d*); but no lien can arise merely for his keep (*e*), unless he has been kept by an innkeeper, who is compelled to take him in (*f*). A lien on goods is not sufficient to warrant the sale of them (*g*), nor does it authorize the possessor to charge for their standing (*h*). A particular lien also arises in the case of salvage, or rescuing a ship

Particular lien.

Salvage.

(*x*) 3 Bos. & Pul. 494.

(*y*) *Skinner* v. *Upshaw*, 2 Lord Raym. 752.

(*z*) *Thompson* v. *Lacey*, 3 B. & Ald. 283.

(*a*) *Sunbolf* v. *Alford*, 3 Mee. & Wels. 248. The lien of innkeepers on the goods of their guests is now regulated by stat. 26 & 27 Vict. c. 41.

(*b*) *Ex parte Ockenden*, 1 Atk. 235.

(*c*) *Franklin* v. *Hosier*, 4 B. & Ald. 341.

(*d*) *Bevan* v. *Walters*, 1 Moo. & Mal. 236.

(*e*) *Wallace* v. *Woodgate*, 1 Ry. & Moo. 293. See *Sanderson* v. *Bell*, 2 Cro. & Mee. 304, 311; 4 Tyr. 244, 252.

(*f*) *Johnson* v. *Hill*, 3 Stark. 172; *Allen* v. *Smith*, 12 C. B., N. S. 638, affirmed in Ex. Cham., 9 Jur., N. S. 1284, 11 W. R. 440.

(*g*) *Thames Iron Works Company* v. *Patent Derrick Company*, 1 John. & H. 93.

(*h*) *British Empire Shipping Company* v. *Somes*, 1 E. B. & E. 353.

or its lading from the perils of the sea or the queen's enemies, for the trouble and risk incurred (*i*); but this kind of lien has been modified by the Merchant Shipping Act, 1854, which provides for the appointment of public receivers of all wreck, into whose hands any person, not being the owner, who finds or takes possession of any wreck, is bound to deliver it as soon as possible (*j*). The lien of a shipowner for freight is now regulated by the Merchant Shipping Act Amendment Act, 1862 (*k*). Freight.

A general lien, when it does not arise by express contract, or from a contract implied by the course of dealing between the parties (*l*), accrues in consequence of the custom of some trade or profession; and it may be local also, that is, confined to some particular place (*m*). It obtains in many trades, such as wharfingers (*n*), dyers (*o*), calico printers (*p*), factors (*q*), policy brokers (*r*), and bankers (*s*), and perhaps also common carriers (*t*). Solicitors and attornies have also a lien on all the deeds and documents of their clients in their possession for their professional charges generally (*u*); but this doctrine General lien. Solicitor's lien.

(*i*) *Hartford* v. *Jones*, 1 Lord Raym. 393; *Baring* v. *Day*, 8 East, 57.

(*j*) Stat. 17 & 18 Vict. c. 104; amended by stats. 18 & 19 Vict. c. 91; 24 Vict. c. 10; 25 & 26 Vict. c. 63; 34 & 35 Vict. c. 110; and 35 & 36 Vict. c. 73.

(*k*) Stat. 25 & 26 Vict. c. 63, ss. 66—78.

(*l*) *Simond* v. *Hibbert*, 1 Rus. & Myl. 719.

(*m*) *Holderness* v. *Collinson*, 7 Barn. & Cress. 212.

(*n*) *Naylor* v. *Mangles*, 1 Esp. 109.

(*o*) *Savill* v. *Barehard*, 4 Esp. 53. See however *Close* v. *Waterhouse*, 6 East, 523, n.

(*p*) *Weldon* v. *Gould*, 3 Esp. 268.

(*q*) *Houghton* v. *Matthews*, 3 Bos. & Pul. 488; *Cowell* v. *Simpson*, 16 Ves. 280.

(*r*) *Man* v. *Shiffner*, 2 East, 523.

(*s*) *Davis* v. *Bowsher*, 5 T. R. 488; *Brandao* v. *Barnett*, 3 C. B. 519, 530.

(*t*) See *Rushforth* v. *Hadfield*, 6 East, 519; 7 East, 224; *Aspinall* v. *Pickford*, 3 Bos. & Pul. 44, note. As to railways, see stat. 8 & 9 Vict. c. 20, s. 97.

(*u*) *Stevenson* v. *Blakelock*, 1

is to be taken in connection with the peculiar nature of title deeds, which being the sinews of the land, follow the seisin of it, and may therefore be held by the client only for a limited interest. Thus, if a tenant for life should leave the title deeds of the land in the hands of his solicitor, the lien of the solicitor for his professional charges would be coextensive only with his client's interest, and on the client's decease the solicitor would be bound to deliver up the deeds to the remainder-man, although his charges might remain unpaid (*v*). So if the client should be a mortgagee, the solicitor having the deeds would be bound to deliver them to the mortgagor, on the reconveyance of the property, on payment to the mortgagee of all principal and interest; for on such reconveyance the mortgagee ceased to have any interest in the lands (*x*). And in like manner if the client should be a mortgagor, the solicitor would have no right to retain the deeds as against the prior claim of the mortgagee (*y*): and if the client should be a trustee, the deeds must be given up for the purposes of the trust (*z*). This lien also extends only to charges strictly professional (*a*), and to documents in the possession of the attorney or solicitor in his professional character (*b*); but it has been held that such lien is assignable, together with the debt and documents, to a third person not a solicitor or attorney (*c*). A mere certificated conveyancer has no general lien on the

Mau. & Sel. 535; *Ex parte Sterling*, 16 Ves. 258; *Ex parte Pemberton*, 18 Ves. 282.

(*v*) *Davies* v. *Vernon*, 6 Q. B. 443, 447.

(*x*) *Wakefield* v. *Newbon*, 6 Q. B. 276.

(*y*) *Smith* v. *Chichester*, 2 Dr. & War. 393; *Blunden* v. *Desart*, *id.* 405; *Pelly* v. *Wathen*, 7 Hare, 351; 1 De Gex, Mac. & Gord. 16.

(*z*) *Baker* v. *Henderson*, 4 Sim. 27.

(*a*) *The King* v. *Sankey*, 5 Ad. & Ell. 423; *Worrell* v. *Johnson*, 2 Jac. & Walk. 218.

(*b*) *Champernown* v. *Scott*, 6 Madd. 93; *Balch* v. *Symes*, T. & Russ. 87.

(*c*) *Bull* v. *Faulkner*, 2 De G. & S. 772, *sed qu.*

documents in his hands (*d*). It is now provided that in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or proceeding in any court of justice, it shall be lawful for the court or judge, before whom any such suit, matter or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges and expenses of or in reference to such suit, matter or proceeding (*e*).

New enactment as to solicitors' lien.

Lien, then, of whatever kind, is merely a right to retain the *possession* of the goods. This right of possession enables the person who has been in possession by virtue of the lien to maintain an action of trover for the goods (*f*); but the *property* in the goods still remains with the owner; and if the person having the lien should give up the possession of the goods, his lien will be lost (*g*); the owner's property in them will draw to it the right of possession, and enable him to maintain an action of trover (*h*). And if the person having the lien should take a security for his debt, payable at a distant day, his lien would on that account be lost, as it would be unreasonable that he should detain the goods till such future time of payment (*i*); and in this case

Property of goods subject to lien is in the owner.

How lieni lost.

(*d*) *Hollis* v. *Claridge*, 4 Taunt. 807; *Steadman* v. *Hockley*, 15 Mee. & Wels. 553.

(*e*) Stat. 23 & 24 Vict. c. 127, s. 28; *Wilson* v. *Hood*, 3 Hurlst. & Colt. 148; *Haymes* v. *Cooper*, 33 Beav. 431.

(*f*) *Legg* v. *Evans*, 6 Mee. & Wels. 36.

(*g*) *Kruges* v. *Wilcox*, Amb. 254.

(*h*) *Sweet* v. *Pym*, 1 East, 4.

(*i*) *Cowell* v. *Simpson*, 16 Ves. 275.

also an action of trover may be maintained by the owner of the goods, by virtue of the right of possession now accrued to him in respect of his property (*k*).

Distress for rent.

When goods are taken under a distress for rent, the property in the goods still remains in the owner, until a sale is made pursuant to the statute (*l*) by which a sale is authorized (*m*).

In all the above cases of finding of goods, bailment, lien and distress, it appears clear, therefore, that the property in the goods is still simply vested in one party only, although the right to their immediate possession may be in another party, and the actual possession possibly in a third.

(*k*) *Hewison* v. *Guthrie*, 2 New Cas. 756, 759.

(*l*) Stat. 2 Wm. & Mary, Sess. 1, c. 5, s. 2.

(*m*) *King* v. *England*, 4 Best & Smith, 782.

CHAPTER III.

OF THE ALIENATION OF CHOSES IN POSSESSION.

Choses in possession have always been freely alienable from one person to another. The feudal principles of tenure, which in ancient times opposed the alienation of landed estates, could have no application to the then insignificant subjects of personal property; although the full right of testamentary disposition was not, as we shall hereafter see, enjoyed in early times. But, though the property in personal chattels may be freely aliened, it is impossible for a man to make a valid grant in law of that in which he has no actual or potential property, but which he only expects to have. A person who has an interest in land may grant all the fruit which may grow upon it hereafter (*a*). So a grant of the next year's wool of all the sheep which a man now has is valid, because he has a potential property in such wool (*b*). But a grant of the wool of all the sheep which a man ever shall have is void (*c*). And in the same manner the assignment of a man's stock in trade passes only such articles as are his property at the time he executes such assignment, and will not comprise any other articles which he may afterwards purchase (*d*); not even if the instrument of assignment should purport to convey all goods which should at any time thereafter be in or upon his dwelling-house (*e*). The property in goods to be

A grant cannot be made of that in which a man has no actual or potential property.

(*a*) *Grantham* v. *Hawley*, Hob. 132; *Petch* v. *Tutin*, 15 Mee. & Wels. 110.

(*b*) *Per* Pollock, C. B., 15 Mee. & Wels. 116.

(*c*) Com. Dig. tit. Grant (D).

(*d*) *Taphill* v. *Hillman*, 6 Man. & Gr. 245; S. C. 6 Scott, N. R. 967.

(*e*) *Lunn* v. *Thornton*, 1 C. B. 379; *Gale* v. *Burnell*, 7 Q. B. 850; *Belding* v. *Read*, Exch. 11 Jur., N. S. 547; 3 Hurlst. & Colt. 955.

hereafter acquired may however be effectually passed by an assignment thereof in equity coupled with a licence to seize them (*f*).

The manner in which the alienation of personal chattels is effected, is in many respects essentially different from the modes of conveying real estate. In ancient times, indeed, there was more similarity than there is at present. The conveyance of land was then usually made by feoffment, with livery of seisin, which was nothing more than a simple gift of an estate in the land accompanied by delivery of possession (*g*). This gift might then have been made by mere word of mouth (*h*); but the Statute of Frauds (*i*) made writing necessary; and now every conveyance of landed property is required to be by deed (*j*). Personal chattels, on the contrary, are still alienable by mere *gift and delivery;* though they may be disposed of by *deed;* and they are also assignable by *sale*, in a manner totally different from the conveyance requisite on the transfer of real estate. Each of these three modes of conveyance deserves a separate notice.

Ancient mode of conveying real property.

Modes of alienation of personal chattels.

Gift and delivery.

1. And first, personal chattels are alienable by a mere gift of them, accompanied by delivery of possession. For this purpose no deed or writing is required, nor is it

(*f*) *Congreve* v. *Evetts*, 10 Exch. 298; *Hope* v. *Hayley*, 5 E. & B. 830; *Allatt* v. *Carr*, Exch. 6 W. R. 578; *Chidell* v. *Galsworthy*, 6 C. B., N. S. 471; *Holroyd* v. *Marshall*, 10 H. of L. Cas. 191; 9 Jur., N. S. 213; *Reeve* v. *Whitmore*, L. C., 12 W. R. 113; 9 Jur., N. S. 1214; 4 De Gex, Jones & Smith, 1; *Brown* v. *Bateman*, L. Rep., 2 C. P. 272; *Blake* v. *Izard*, C. P., 16 W. R. 108.

(*g*) See Principles of the Law of Real Property, 113, 2nd ed.; 118, 3rd & 4th eds.; 121, 5th ed.; 127, 6th ed.; 130, 7th ed.; 138, 8th & 9th eds.; 139, 10th ed.

(*h*) See Principles of the Law of Real Property, 117, 2nd ed.; 122, 3rd & 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 143, 8th & 9th eds.; 144, 10th ed.

(*i*) Stat. 29 Car. II. c. 3, ss. 1, 2.

(*j*) Stat. 8 & 9 Vict. c. 106, s. 3.

essential that there should be a consideration for the gift. Thus, if I give a horse to A. B., and at the same time deliver it into his possession, this gift is complete and irrevocable, and the property in the horse is thenceforward vested in A. B. (*k*). But if I purport to assign the horse, and yet retain the possession, the gift, though made by writing (so that it be not a deed), is absolutely void at law (*l*); and equity will give no relief to the donee (*m*). It may, however, be observed, that if the donor should not attempt to part with the subject of gift, but should declare that he keeps possession of it *in trust* for the donee, equity will seize on and enforce this trust, although voluntarily created (*n*). In some cases it is not possible to make an immediate and complete delivery of the subject of gift; and in these cases, as near an approach as possible must be made to actual delivery; and if this be done, the gift will be effectual. Thus if goods be in a warehouse, the delivery of the key will be sufficient (*o*); timber may be delivered by marking it with the initials of the assignee (*p*), and an actual removal is not essential to the delivery of a haystack (*q*). But the delivery of a part of goods capable of actual delivery, is not a sufficient delivery of the whole (*r*).

Trust, though voluntary, enforced in equity.

(*k*) 2 Black. Com. 441.

(*l*) *Irons* v. *Smallpiece*, 2 Barn. & Ald. 551; *Miller* v. *Miller*, 3 P. Wms. 356; *Bourne* v. *Fosbrooke*, 18 C. B., N. S. 515. See also *Shower* v. *Pilck*, 4 Ex. Rep. 478.

(*m*) *Antrobus* v. *Smith*, 12 Ves. 39, 46; *Edwards* v. *Jones*, 1 My. & Cr. 226; *Dillon* v. *Coppin*, 4 My. & Cr. 647, 671.

(*n*) *Ellison* v. *Ellison*, 6 Ves. 656; *Ex parte Dubost*, 18 Ves. 140, 150; *Vandenberg* v. *Palmer*, 4 Kay & John. 204; *Jones* v. *Lock*, L. C. 11 Jur., N. S. 913, correcting *Scales* v. *Maude*, 6 De G., M. & G. 43, 51.

(*o*) *West* v. *Skip*, 1 Ves. sen. 244; *Ryall* v. *Rowles*, 1 Ves. sen. 362; 1 Atk. 171; *Ward* v. *Turner*, 2 Ves. sen. 443.

(*p*) *Stoveld* v. *Hughes*, 14 East, 308.

(*q*) *Chaplin* v. *Rogers*, 1 East, 190. See *Young* v. *Matthews*, L. Rep., 2 C. P. 127.

(*r*) *Per* Pollock, C. B., 14 Mee. & Wels. 37, correcting a dictum of Taunton, J., 2 Ad. & Ell. 73.

Constructive delivery when goods are in the custody of a simple bailee.

When goods are in the custody of a simple bailee, such as a wharfinger or carrier, the possession of such bailee is, as we have seen (*s*), constructively the possession of the bailor; and either the bailor or bailee may maintain an action of trover in respect of the goods. This constructive possession of the bailor may be delivered by him to a third person, by making as near an approach to actual delivery as is possible under the circumstances of the case. By the custom of Liverpool the delivery of goods in another person's warehouse is effected by merely handing over a delivery order (*t*); and the property in wines in the London Docks appears to pass by the indorsement and delivery of the dock warrant (*u*). But in the absence of a custom to the contrary, it would seem that there can be no legal delivery of goods into the hands of a third person without the consent of the warehouseman or wharfinger in whose custody the goods are (*x*). When goods are at sea, the delivery of the bill of lading, after its endorsement, is a delivery of the goods themselves (*y*); for it is not possible, in this case, to make any nearer approach to an actual delivery (*z*).

Dock warrant.

Bill of lading.

Alienation by deed.

2. The next method of alienating chattels personal is by deed. Every deed imports a consideration (*a*); for

(*s*) *Ante*, p. 26.

(*t*) *Dixon* v. *Yates*, 5 Barn. & Adol. 313; and see *Greaves* v. *Hepke*, 2 Barn. & Ald. 131; *Kingsford* v. *Merry*, 1 Hurl. & N. 503.

(*u*) *Ex parte Davenport*, Mon. & Bl. 165. Delivery orders are now subject to a stamp duty of one penny, and dock warrants to a stamp duty of threepence, by statutes 23 Vict. c. 15, and 23 & 24 Vict. c. 111; repealed by stat. 33 & 34 Vict. c. 99; and re-enacted by stat. 33 & 34 Vict. c. 97.

(*x*) *Zwinger* v. *Samuda*, 7 Taunt. 265; *Lucas* v. *Dorrien*, *ibid.* 278; *Bryans* v. *Nix*, 4 Mee. & Wels. 775, 791; *M'Ewan* v. *Smith*, 2 H. of L. Cases, 309. And see *Pearson* v. *Dawson*, 1 E. B. & E. 448.

(*y*) *Mitchell* v. *Ede*, 11 Ad. & Ell. 888; and see stat. 18 & 19 Vict. c. 111.

(*z*) 1 Ves. sen. 362; 1 Atk. 171.

(*a*) Plowd. 308; 3 Burr. 1639; 1 Fonb. Eq. 342; 2 Fonb. Eq. 26;

it was anciently supposed, that no person would do so solemn an act as the sealing and delivery of a deed without some sufficient ground. The presence of this implied consideration renders a deed sufficient of itself to pass the property in goods (*b*). It supplies on the one hand the want of delivery, and on the other the want of that actual consideration which always exists in the third and most usual mode of alienation of chattels personal, which is,

Sale.

3. By sale. It is in this last and most usual method of alienation that the contrast presents itself between the means to be employed for the alienation of real property and chattels personal. When a contract has been entered into for the sale of lands, the legal estate in such lands still remains vested in the vendor; and it is not transferred to the vendee until the vendor shall have executed and delivered to him a proper deed of conveyance. In *equity*, it is true, that the lands belong to the purchaser from the moment of the signature of the contract; and from the same moment the purchase-money belongs, in equity, to the vendor (*c*). But at *law* the only result of the signature of a contract for the sale of lands is, that each party acquires a right to sue the other for pecuniary damages, in case such contract be not performed. Not so, however, the case of a contract for the sale of chattels personal. Such a contract immediately transfers the legal property in the goods sold from the vendor to the vendee, without the necessity of anything further (*d*). In order to this, it

Effect of a contract for the sale of lands.

Contract for sale of goods transfers the property.

Principles of the Law of Real Property, 118, 2nd ed.; 123, 3rd & 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 144, 8th ed.; 143, 9th ed.; 144, 10th ed.

(*b*) *Carr* v. *Burdiss*, 1 C., M. & R. 782, 788; S. C. 5 Tyrw. 309, 316.

(*c*) Principles of the Law of Real Property, 133, 2nd ed.; 137, 3rd & 4th eds.; 143, 5th ed.; 150, 6th ed.; 153, 7th ed.; 159, 8th ed.; 160, 9th ed.; 161, 10th ed.

(*d*) Com. Dig. tit. Biens (D), 3.

is of course necessary that the transaction have within itself all the legal requisites for a sale; and these requisites will accordingly form the next subject for our consideration (*e*).

Requisites for the sale of goods under the value of 10*l*.

The requisites for the sale of goods partly depend upon their value. Goods under the value of 10*l*. sterling may now be sold in the same manner as goods of whatever value were anciently saleable; whereas goods of the value of 10*l*. or upwards are now regulated in their sale by an enactment contained in the Statute of Frauds (*f*). And first, with regard to such goods and chattels as do not fall within this enactment, there can be no sale without a tender or part payment of the money, or a tender or part delivery of the goods, unless the contract is to be completed at a future time. Thus if A. should agree to pay so much for the goods, and B., the owner, should agree to take it, and the parties should then separate without anything further passing, this is no sale (*g*). But if A. should tender the money, or pay but a penny of it, or B. should tender the goods, or should deliver any, even the smallest portion, of them to A., or if the payment or delivery or both should be postponed by agreement till a future day, the sale will be valid, and the property in the goods will pass at once from the vendor to the vendee (*h*). If, however, any act should remain to be done on the part of the seller previously to the delivery of the goods, the property will not pass to the vendee until such act shall have been done. Thus, if goods, the weight of which is unknown, are sold by

(*e*) In the recent cases of *Thompson* v. *Pettitt*, 10 Q. B. 101, and *Flory* v. *Denny*, 7 Ex. Rep. 581, the property in goods was held to pass by a mere written memorandum by way of *mortgage*, without any delivery; *sed qu.*

(*f*) 29 Car. II. c. 3, s. 17.

(*g*) 2 Bla. Com. 447; Smith's Mercantile Law, 461, 5th ed.; 488, 6th ed.

(*h*) Shep. Touch. 224; *Martindale* v. *Smith*, 1 Q. B. 389, 395.

weight (*i*), or if a given weight or measure is sold out of a larger quantity (*k*), the property will not pass to the vendee until the price shall have been ascertained by weighing the goods in the one case, or the goods sold shall have been separated by weight or measure in the other. So if an article be ordered to be manufactured, the property in it will not vest in the person who gave the order, until it shall, with his assent, have been appropriated for his benefit (*l*). It is not, however, necessary that a price should actually be named. A contract to sell without naming a price is a contract to sell at a reasonable price; and the property in goods may well pass by such a contract (*m*). So a contract to sell by weight may pass the property in the goods before they are actually weighed, if such appear to be the intention of the parties (*n*).

Requisites for the sale of goods of the value of 10*l.* or upwards.

But with regard to goods of the value of 10*l.* or upwards, additional requisites have been enacted by the seventeenth section of the Statute of Frauds (*o*), which provides, "that no contract for the sale of any goods, wares and merchandizes for the price of 10*l.* sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

(*i*) *Hanson* v. *Meyer*, 6 East, 614; *Swanwick* v. *Sothern*, 9 Ad. & Ell. 895.

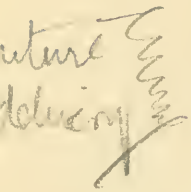
(*k*) *Busk* v. *Davies*, 2 Mau. & Selw. 397; *Shepley* v. *Davis*, 5 Taunt. 617.

(*l*) *Atkinson* v. *Bell*, 3 B. & Cress. 277; *Wilkins* v. *Bromhead*, 5 Man. & Gr. 963, 973.

(*m*) *Joyce* v. *Swann*, 17 C. B., N. S. 84.

(*n*) *Turby* v. *Bates*, 2 Hurl. & Norm. 200.

(*o*) 29 Car. II. c. 3.



And by a modern statute (*p*), this enactment "shall extend to all contracts for the sale of goods of the *value* of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

What is an acceptance and actual receipt within the statute.

The above section of the Statute of Frauds has been interpreted by a vast number of cases decided on almost every one of the phrases it contains (*q*). The chief difficulty has been to determine the exact meaning of the acceptance of part of the goods and actual receipt of the same, required on the part of the buyer, and to ascertain in each particular case whether such acceptance and actual receipt have taken place or not. The acceptance required appears not to be necessarily such as shall preclude the purchaser from afterwards objecting to the quality of the goods (*r*), and it may be prior to the receipt (*s*). Actual receipt seems, according to the great preponderance of authority, to mean receipt of the *possession* of the goods, and to be merely correlative to delivery of possession on the part of the vendor (*t*). There must, therefore, be an actual transfer of the article sold, or some part thereof, by the seller, and an

(*p*) Stat. 9 Geo. IV. c. 14, s. 7. See *Hoadley* v. *M'Laine*, 10 Bing. 482, 486.

(*q*) See Smith's Mercantile Law, 468 *et seq.* 5th ed.; 495 *et seq.* 6th ed.

(*r*) *Morton* v. *Tibbett*, 15 Q. B. 428; *Bushell* v. *Wheeler*, 15 Q. B. 442; *Currie* v. *Anderson*, 2 Ellis & Ellis, 592, 600. See, however, *Hunt* v. *Hecht*, 8 Exch. 814; *Nicholson* v. *Bower*, 1 Ellis & Ellis, 72; *Smith* v. *Hudson*, Q. B. 11 Jur., N. S. 622; 6 Best & Smith, 431.

(*s*) *Cusack* v. *Robinson*, 1 Best & Smith, 299.

(*t*) Smith's Mercantile Law, 472, n. (*g*), 5th ed.; 499, n. (*m*), 6th ed. *Saunders* v. *Topp*, 4 Ex. Rep. 390.

actual taking possession of it by the buyer (*u*). The possession of a simple bailee is, however, as we have seen (*v*), constructively the possession of the bailor. If therefore the vendor should change his character and become the bailee of the purchaser, there may be a sufficient actual receipt in law on the part of the purchaser, although the goods still remain in the possession of the vendor (*x*). So if any part of the goods be delivered to an agent of the vendee, or to a carrier named by him, this is a sufficient receipt by the vendee himself (*y*); and if the goods should be in the possession of a warehouseman or wharfinger at the time of sale, the receipt by the purchaser of a delivery order, provided it were coupled with the assent of the bailee, would be a sufficient receipt of the goods within the statute (*z*). The wharfinger holds the goods as the agent of the vendor, until he has agreed with the purchaser to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the purchaser, and the possession of such wharfinger is that of the purchaser; and then only is there a constructive delivery to him (*a*).

The requisitions of the statute are in the alternative.

The requisitions of the statute, it will be observed, are in the alternative. Either the buyer must accept part of the goods sold, and actually receive the same, *or* he must give something in earnest or in part of payment, *or* some note or memorandum in writing must be

(*u*) *Baldey* v. *Parker*, 2 B. & Cress. 37, 41.

(*v*) *Ante*, p. 26.

(*x*) *Castle* v. *Sworder*, Exch. Chamb. 6 H. & N. 828, reversing the judgment of the Court of Exchequer, 5 H. & N. 281.

(*y*) *Dawes* v. *Peck*, 8 T. Rep. 330; *Hart* v. *Bush*, 1 E. B. & E. 494, 498. See, however, *Norman* v. *Phillips*, 14 M. & W. 277; *Coombs* v. *Bristol and Exeter Railway Company*, 3 H. & N. 510.

(*z*) *Bentall* v. *Burn*, 3 B. & Cress. 423; *Pearson* v. *Dawson*, 1 E. B. & E. 448. See *ante*, p. 36.

(*a*) *Farina* v. *Horne*, 16 M. & W. 119, 123.

signed. The two former alternatives are left as they were before the statute; but the last is a new requisition which must be observed in the absence of either of the former (*b*). The effect of the statute, therefore, is to abolish tender and mere words as sufficient for a sale, and to substitute for them the more exact evidence of a note or memorandum in writing (*c*). But as the memorandum may be signed by an agent lawfully authorized, the bought or sold notes given by a broker are a sufficient memorandum within the meaning of the statute (*d*). And it is held that the entry of a purchaser's name by an auctioneer's clerk at an auction is also sufficient to satisfy the statute, as the clerk is, for that purpose, the authorized agent of the purchaser (*e*). But one of the contracting parties to a sale cannot be the agent for the other for the purpose of signing a memorandum of the bargain (*f*).

Memorandum in writing.

When the agreement is not to be performed within a year.

If the agreement is not to be performed within the space of one year from the making thereof, then, however small be the value of the goods, no action can be brought upon it, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This is another provision of the Statute of Frauds (*g*), and will be hereafter noticed more particularly.

(*b*) *Lee* v. *Griffin*, 1 Best & Smith, 272; *Wilkinson* v. *Evans*, Law Rep., 1 C. P. 407. See *Vandenbergh* v. *Spooner*, Law Rep., 1 Ex. 316.

(*c*) Every memorandum, letter, or agreement made for or relating to the sale of any goods, wares or merchandize, is exempt from all stamp duty; stat. 55 Geo. III. c. 184, Sched., Part I. tit. Agreement; now repealed by stat. 33 & 34 Vict. c. 99; and re-enacted by stat. 33 & 34 Vict. c. 97, Schedule, tit. Agreement.

(*d*) *Grove* v. *Aflalo*, 6 B. & Cress. 117; *Barton* v. *Crofts*, 16 C. B., N. S. 11.

(*e*) *Bird* v. *Boulter*, 4 B. & Adol. 443.

(*f*) *Farebrother* v. *Simmons*, 5 B. & Ald. 333.

(*g*) 29 Car. II. c. 3, s. 4.

Although the property in goods sold passes, as we have seen (*h*), from the vendor to the vendee, immediately upon the execution of a valid contract for sale, yet the possession of the goods of course remains with the vendor until he deliver them, which he is bound to do when the purchaser is ready to pay the price (*i*), but not before (*k*). And so long as the vendor retains actual or constructive possession of the goods, he has a lien upon them for so much of the purchase-money as may remain unpaid (*l*). But when the goods are once delivered by the vendor out of his own actual or constructive possession, his lien is gone; for lien in law is, as we have seen (*m*), merely a right to retain possession, and not to recover it when given up.

Vendor's lien

Under certain circumstances, however, the vendor of goods has a right to resume their possession, with which he had previously parted under a contract for sale. This right is called the right of *stoppage in transitu*; and it occurs when goods are consigned entirely or partly (*n*) on credit from one person to another, and the consignee becomes bankrupt or insolvent before the goods arrive. In this event the consignor (*o*) has a right to direct the captain of the ship, or other carrier, to deliver the goods to himself or his agent instead of to the consignee, who has thus become unable to pay for them. The right of stoppage in transitu was first allowed and enforced only by the Court of Chancery, which, in the exercise of its equitable jurisdiction, considered that, under the circumstances above mentioned, it was very allowable in equity

Stoppage in transitu.

First allowed by Court of Chancery.

(*h*) *Ante*, p. 37.

(*i*) *Rawson* v. *Johnston*, 1 East, 203.

(*k*) *Bloxam* v. *Sanders*, 4 Barn. & Cress. 941.

(*l*) *Dixon* v. *Yates*, 5 Barn. & Adol. 313; *Lackington* v. *Atherton*, 7 Man. & G. 360.

(*m*) *Ante*, p. 27.

(*n*) *Hodgson* v. *Loy*, 7 T. R. 440.

(*o*) *Bird* v. *Brown*, 4 Ex. Rep. 786.

for the consignor to get his goods again into his own hands(*p*). But the right was subsequently acknowledged by the courts of law; and it is now constantly enforced by them. As this right was originally of equitable origin it cannot be expected to depend on strictly legal principles; and the doctrines of law on this particular subject are in fact unlike its usual doctrines on other matters. Thus it is at variance with the general principles of law that a man should be allowed to transfer to another a right which he has not, or that a second purchaser should stand in a better position than his vendor (*q*); but the consignee of goods may, by indorsing the bill of lading to a *bonâ fide* indorsee, defeat the consignor's right to stop in transitu (*r*). So a delivery of goods into the possession of a carrier appointed by the vendee is, in construction of law, a delivery to the vendee himself, and divests the vendor's lien for the unpaid purchase-money (*s*); but until the *transitus* is completely ended, or the goods come to the actual possession of the vendee, the vendor's right to stop them in transitu may still be exercised in the event of the bankruptcy or insolvency of the vendee (*t*), unless indeed such right be defeated, as we have said, by a *bonâ fide* indorsement of the bill of lading. Thus, although by the sale of the goods the

(*p*) *Wiseman* v. *Vandeputt*, 2 Vern. 203; *Snee* v. *Prescot*, 1 Atk. 245.

(*q*) *Dixon* v. *Yates*, 5 Barn. & Adol. 339.

(*r*) *Lickbarrow* v. *Mason*, 2 T. R. 63; 1 H. Bl. 357; 6 East, 21; 1 Smith's Leading Cases, 388; *Jenkyns* v. *Usborne*, 7 Man. & Gr. 678, 699; *Roger* v. *The Comptoir D'Escompte de Paris*, Law Rep., 2 P. C. 393.

(*s*) *Dawes* v. *Peck*, 8 T. R. 330; *ante*, p. 41; *Wilmshurst* v. *Bowker*, in error, 7 Man. & Gr. 882.

(*t*) *Holst* v. *Pownal*, 1 Esp. 240; *Northey* v. *Field*, 2 Esp. 613, *Jackson* v. *Nichol*, 5 New Cases, 508, 519. See *Van Casteel* v. *Booker*, 2 Ex. Rep. 691; *Heinekey* v. *Earle*, 8 E. & B. 410; *Smith* v. *Hudson*, Q. B. 11 Jur., N. S. 622; 6 Best & Smith, 431; *Berndtson* v. *Strang*, L. C., 16 W. R. 1025; L. Rep., 3 Ch. 588; *Fraser* v. *Witt*, L. R., 7 Eq. 64; *Roger* v. *The Comptoir D'Escompte de Paris*, Law Rep., 2 P. C. 393.

property in them, involving the risk of their loss, passes to the purchaser, and although the possession of them be delivered to a carrier named by him, still such possession may be resumed by the vendor during the journey, in the event of the bankruptcy or insolvency of the vendee. As this right is a departure from legal principles on the vendor's behalf, it is allowed only in one of the two cases of bankruptcy or insolvency, by which latter term appears to be here meant a general inability to pay, evidenced by stopping of payment (*u*). When possession of goods has been resumed by the vendor under his right of stoppage in transitu, he is restored to the lien for the unpaid purchase-money which he had before he parted with such possession; but, according to the better opinion, the contract for sale is not thereby rescinded (*x*).

A recovery in trover vests the property in the defendant.

There is one case in which the property in goods passes from one person to another by payment of their value without any actual sale. In any action of trover (*y*) the plaintiff is entitled to damages equal to the value of the property he has lost, but not further, unless he has sustained any special damage (*z*). The defendant, therefore, when he has paid the amount of the damages, is entitled to retain the goods in respect of which the action is brought; and the property in them vests in him accordingly (*a*).

(*u*) See Smith's Merc. Law, 525; n. (*b*), 5th ed.; 554, n. 6th ed.; The case of *Wilmshurst* v. *Bowker*, 5 New Cas. 541; 7 Scott, 561; 2 Man. & G. 812, was reversed in error, 7 Man. & Gr. 882.

(*x*) *Bloxam* v. *Sanders*, 4 Barn. & Cress. 949; 1 Smith's Leading Cases, 432; *Schotsmans* v. *Lancashire and Yorkshire Railway Company*, Law Rep., 2 Ch. 332, 340; 36 L. J., N. S. 361, 366.

(*y*) See *ante*, p. 23.

(*z*) *Bodley* v. *Reynolds*, 8 Q. B. 779.

(*a*) *Cooper* v. *Shepherd*, 3 C. B. 266, 272. See *Buckland* v. *Johnson*, C. P., 18 Jur. 775; 15 C. B. 145; *Brinsmead* v. *Harrison*, C. P., 19 W. R. 956.

Alien.

The alienation of personal chattels is prohibited to be made by certain persons and for certain objects. And first with respect to persons. An *alien* or foreigner was, until recently, under great restrictions as to the acquirement of real estate (*b*); but with respect to both real estate and personal chattels he now stands on the same footing as a natural-born subject; for by the Naturalization Act, 1870 (*c*), it is enacted (*d*) that real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to a natural-born British subject. This act also contains provisions empowering naturalized aliens to divest themselves of their status in certain cases. It also provides (*e*) that any person who, by reason of his having been born within the dominions of her Majesty, is a natural-born subject, but who also at the time of his birth became, under the law of any foreign state, a subject of that state, may, if of full age and not under any disability, make a declaration of alienage in the manner provided by the act, after which such person shall cease to be a British subject. Any British subject who voluntarily becomes naturalized in a foreign state is now regarded as an alien (*f*). Certificates of naturalization (*g*) and of readmission to British nationality (*h*) may also be granted in certain

The Naturalization Act, 1870.

Declaration of alienage.

(*b*) See Principles of the Law of Real Property, 56, 2nd ed.; 58, 3rd & 4th eds.; 61, 5th & 6th eds.; 62, 7th & 8th eds.; 63, 9th & 10th eds.

(*c*) Stat. 33 Vict. c. 14, repealing stats. 7 & 8 Vict. c. 66; 10 & 11 Vict. c. 83, and other statutes, and amended by stats. 33 & 34 Vict. c. 102, and 35 & 36 Vict. c. 39.

(*d*) Sect. 2.

(*e*) Sect. 4.

(*f*) Sect. 6.

(*g*) Sect. 7.

(*h*) Sect. 8.

cases. The following enactments have been made with respect to the national status of women and children. (1). A married woman is deemed to be a subject of the state of which her husband is for the time being a subject. (2). A widow, being a natural-born British subject, who has become an alien by or in consequence of her marriage, is deemed to be a statutory alien, and may as such, at any time during widowhood, obtain a certificate of readmission to British nationality as provided by the act. (3). Where the father, being a British subject, or the mother, being a British subject and a widow, becomes an alien in pursuance of the act, any child of such father or mother who, during infancy, has become resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, shall be deemed to be a subject of the state of which the father or mother has become a subject, and not a British subject. (4). Where the father, or the mother being a widow, has obtained a certificate of readmission to British nationality, every child of such father or mother, who during infancy has become resident in the British dominions with such father or mother, shall be deemed to have resumed the position of a British subject to all intents. (5). Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject (*i*). Nothing contained in the act is to deprive any married woman of any estate or interest in real or personal property to which she may have become entitled previously to the passing of the act, or affect such estate or interest to her prejudice (*k*).

Women and children.

Married women.

Widow.

Children.

Saving clause as to married women.

(*i*) Stat. 33 Vict. c. 14, s. 10. (*k*) Stat. 35 & 36 Vict. c. 39, s. 3.

Infant, idiot and lunatic.

The gift of an *infant* or person under the age of twenty-one years is voidable (*l*), and that of an *idiot* or *lunatic* appears to be absolutely void (*m*): in this respect the law of personal chattels is now the same as that of real estate (*n*).

Married women.

Married women also are incapable of making any disposition of personal chattels, except such as may be settled in equity in trust for their own *separate use;* for marriage is an absolute gift in law of all the wife's choses in possession to her husband, as well those she is possessed of at the time of the marriage, as those which come to her during her coverture (*o*).

Outlaw.

Where a person is outlawed, or put out of the protection of the law, his property becomes forfeited to the crown (*p*).

Convicts.

And persons convicted of treason or felony formerly forfeited on such conviction the whole of their goods and chattels to the crown: and nothing but a *bonâ fide* alienation for a valuable consideration, made previously to conviction, could avert such forfeiture (*q*). When a felony was not capital, the punishment endured had the effect of a pardon (*r*); but the restoration to civil rights did not take effect till the determination of the period of punishment. All personal property, therefore, which accrued to a felon during his transportation was forfeited to the crown (*s*); but a mere contingent interest was not forfeited, if it did not vest until the

(*l*) Bac. Abr. tit. Infancy and Age (I), 3.

(*m*) *Ibid.* tit. Idiots and Lunatics (F).

(*n*) See Principles of the Law of Real Property, 57, 2nd ed.; 59, 3rd & 4th eds.; 62, 5th ed.; 63, 6th ed.; 64, 7th & 8th eds.; 65, 9th & 10th eds.

(*o*) Co. Litt. 300 a; 1 Rop. Husb. and Wife, 169. See *post*, the chapter on Husband and Wife.

(*p*) 3 Bla. Com. 284; *Tynte* v. *The Queen*, 7 Q. B. 216; *Solomon* v. *Graham*, 5 E. & B. 320.

(*q*) 3 Rep. 82 b; 4 Bla. Com. 387, 388; *Perkins* v. *Bradley*, 1 Hare, 219; *Chowne* v. *Baylis*, 31 Beav. 351.

(*r*) Stat. 9 Geo. IV. c. 32, s. 3.

(*s*) *Roberts* v. *Walker*, 1 Russ. & M. 752.

expiration of the period of banishment (*t*). But the law on this subject is now altered by a recent act (*u*) which provides (*x*) that after its passing, no confession, verdict, inquest, conviction or judgment of or for any treason or felony or felo de se, shall cause any attainder or corruption of blood, or any forfeiture or escheat: provided that nothing in the act shall affect the law of forfeiture consequent upon outlawry. The act provides for the appointment by the crown of an administrator of the property of the convict (*y*). And all the real and personal property, including choses in action (*z*) to which the convict was, at the time of his conviction, or shall afterwards, while he shall continue subject to the operations of the act, become or be entitled, shall vest in such administrator for all the estate and interest of such convict therein (*a*). The administrator has absolute power to let, mortgage, sell, convey and transfer any part of such property as to him shall seem fit (*b*). And after payment of costs and expenses (*c*) and the debts and liabilities of the convict (*d*) and of compensation to persons who may have suffered from any alleged criminal or fraudulent act of the convict (*e*), and of allowances for any wife, child, or reputed child, or any other relative, or reputed relative, of the convict dependent upon him for support (*f*) the property is to be preserved for the benefit of the convict, and the surplus is to be restored to him or his representatives on the completion of his sentence, or on his pardon or death (*g*). If no such administrator shall have been appointed, an interim curator may be appointed by justices in petty sessions

Forfeiture abolished.

Administrator of convicts' property.

Interim curator.

(*t*) *Stokes* v. *Holden*, 1 Keen, 145; *Thompson's trusts*, 22 Beav. 506.

(*u*) Stat. 33 & 34 Vict. c. 23, passed 4th July, 1870.

(*x*) Sect. 1.

(*y*) Sect. 9.

(*z*) *Ante*, p. 4.

(*a*) Stat. 33 & 34 Vict. c. 23, s. 10.

(*b*) Sect. 12; see also sect. 17.

(*c*) Sect. 13.

(*d*) Sect. 14.

(*e*) Sect. 15.

(*f*) Sect. 16.

(*g*) Sects. 7, 18.

to take care of the property of the convict in the mean time (*h*).

Gift for defrauding creditors.

With regard to the objects for which the alienation of chattels personal is prohibited, gifts to charitable purposes are not restricted, neither are corporations excepted objects, as in the case of landed property (*i*). But by a statute of the reign of Elizabeth (*k*), the gift or alienation of any lands, tenements, hereditaments, *goods and chattels*, made for the purpose of delaying, hindering or defrauding creditors, is rendered void as against them, unless made upon *good*, which here means *valuable*, consideration, and *bonâ fide* to any person not having at the time of such gift any notice of such fraud. There are also more stringent provisions to the same effect contained in the bankrupt laws, to which reference will be hereafter made in the chapter on bankruptcy. The fraudulent purpose intended by the statute of Elizabeth can of course only be judged of by circumstances. Thus it has been held that if the owner of goods make an absolute assignment of them by deed to one of his creditors, and yet remain in the possession of the goods, such remaining in possession is a badge of fraud, which renders the assignment void, by virtue of the statute, as against the other creditors (*l*). But if the assignment be made to secure the payment of money at a future day, with a proviso that the debtor shall remain in possession of the goods until he shall make default in payment, the possession of the debtor, being then consistent with the terms of the deed, is not regarded in modern times as rendering the transaction fraudulent within the meaning of the statute (*m*). Such

(*h*) Stat. 33 & 34 Vict. c. 23, ss. 21—26.

(*i*) See Principles of the Law of Real Property, 58, 2nd ed.; 60, 61, 3rd & 4th eds.; 64, 65, 5th ed.; 69, 6th ed.; 72, 7th & 8th eds; 74, 9th ed.; 75, 10th ed.

(*k*) Stat. 13 Eliz. c. 5.

(*l*) *Twyne's case*, 3 Rep. 80 b; 1 Smith's Leading Cases, 1; *Edwards* v. *Harben*, 2 T. Rep. 587.

(*m*) *Edwards* v. *Harben*, 2 T. Rep. 587; *Martindale* v. *Booth*, 3 Barn. & Adol. 498; *Reed* v. *Wilmot*, 7 Bing. 577.

a transaction is in fact a *mortgage* of the goods, analogous to a mortgage of lands (*n*). The property in the goods passes at law by the deed to the mortgagee (*o*), whilst the possession of them rightly remains with the mortgagor. The mortgagee, therefore, cannot maintain an action of trover for the goods against a stranger until default has been made by the mortgagor in payment of the money secured (*p*). In this respect a mortgage of goods differs from a mere pledge, in which the property in the goods remains with the pledgor, and the pledgee, although he may have power to sell them, obtains possession only (*q*), the right to retain which enables him to maintain an action of trover (*r*). The chief disadvantage in a mortgage of goods is, that, as the goods continue in the possession of the mortgagor as reputed owner, they will, by virtue of provisions of the bankrupt acts, become liable, in the event of his bankruptcy, to be sold for the benefit of his creditors generally (*s*). By recent acts of parliament (*t*) every bill of sale of personal chattels, whereby the grantee

Mortgage of goods.

Registration of bills of sale.

(*n*) See Principles of the Law of Real Property, 332, 2nd ed.; 349, 4th ed.; 360, 5th ed.; 382, 6th ed.; 389, 7th ed.; 407, 8th ed.; 403, 9th ed.; 406, 10th ed.

(*o*) *Gale* v. *Burnell*, 7 Q. B. 850.

(*p*) *Bradley* v. *Copley*, 1 C. B. 685; *Brierley* v. *Kendall*, 17 Q. B. 937. If the mortgagor should retain possession *after* default in payment at the time specified, it may possibly be doubted whether the security would not then be void as against creditors under the statute of Elizabeth, for, by the terms of the deed, the mortgagor is only to enjoy possession *until* default. But the better opinion is that the deed will still be good. See 2 Davidson's Precedents, 609, 2nd ed.; *Ex parte Sparrow*, 2 De G., M. & G. 907.

(*q*) Ante, p. 26.

(*r*) *Legg* v. *Evans*, 6 Mee. & Wels. 36.

(*s*) *Ryall* v. *Rolle*, 1 Atk. 165, 170; S. C. nom. *Ryall* v. *Rowles*, 1 Ves. sen. 348; stat. 6 Geo. IV. c. 16, s. 72, repealed and re-enacted by stat. 12 & 13 Vict. c. 106, s. 125; repealed by stat. 32 & 33 Vict. c. 83, and re-enacted by stat. 32 & 33 Vict. c. 71, s. 15, par. (5); *Freshney* v. *Carrick*, 1 H. & N. 653; *Spackman* v. *Miller*, 12 C. B., N. S. 659; *Hornsby* v. *Miller*, 1 Ell. & Ell. 192.

(*t*) Stats. 17 & 18 Vict. c. 36; 29 & 30 Vict. c. 96.

shall have power to take possession of any effects therein comprised, must be registered in the office of the Court of Queen's Bench within twenty-one days, by filing the same, or a copy thereof, in that office; otherwise such bill of sale is rendered void, so far as regards any of the goods in the apparent possession of the grantor, as against the trustee for the creditors of the grantor, in case of his bankruptcy, and as against the assignees under any assignment for the benefit of his creditors, and as against all sheriffs' officers and other persons seizing the effects in execution of any process of any court of law or equity issued against the goods of the grantor, and also as against any subsequent duly registered bill of sale (*u*). Such bills of sale before the act were valid as against an execution creditor, though void as against assignees under the bankruptcy of the grantor, and the act does not appear to give to such bills of sale as are filed under it any greater validity than they had before (*x*). But if the bill of sale be not filed, the goods may now be taken in execution, which they could not have been before the act. The act does not apply to fixtures, when they pass by a conveyance of the premises to which they are affixed (*y*). The Bills of Sale Act, 1866 (*z*), now provides for the renewal every five years of the registration of bills of sale, by an affidavit to be filed in a given form that the security is still subsisting, without which the prior registration will cease to be of any effect.

Fixtures.

Registration to be renewed every five years.

(*u*) *Richards* v. *James*, L. Rep., 2 Q. B. 285.

(*x*) *Stansfeld* v. *Cubitt*, 2 De G. & Jones, 222; *Badger* v. *Shaw*, Q. B., 8 W. R. 210; 6 Jur., N. S. 377; 2 Ell. & Ell. 472; *Ex parte Harding*, V. C. B., L. Rep., 15 Eq. 223.

(*y*) *Mather* v. *Fraser*, 2 Kay & J. 536; *Waterfall* v. *Pennistone*, 6 E. & B. 876; *Boyd* v. *Shorrock*, V. C. W., L. Rep., 5 Eq. 72. The bill of sale must be duly stamped before it can be registered. Stat. 24 & 25 Vict. c. 91, s. 34; repealed by stat. 33 & 34 Vict. c. 99, and re-enacted by stat. 33 & 34 Vict. c. 97, s. 57.

(*z*) Stat. 29 & 30 Vict. c. 96.

Involuntary alienation for payment of debts.

Choses in possession have long been liable to involuntary alienation for the payment of the debts of their owner. On the decease of any person, his personal property generally has always been liable, in the first place, to the payment of his debts of every kind. And if a creditor take proceedings against his debtor in the debtor's lifetime, a sale of his goods and chattels may be procured by means of a writ of *fieri facias* (*fi. fa.*) issued in *execution* of the *judgment* of the court. This writ is of very ancient date, and is usually said to be given by the common law; though some suppose that its name arose from the wording of the statute of Edward I. (*a*), by which the writ of *elegit* was provided (*b*). The writ directs the sheriff to cause the debt to be realized out of the goods and chattels of the debtor, *quod fieri facias de bonis et catallis*, &c.: and a sale of the goods is made by the sheriff accordingly. And the seizure and sale of the goods of a trader on an execution for obtaining payment of not less than fifty pounds, is now an act of bankruptcy (*c*). Goods however are not, as lands formerly were, affected by the mere entry of a *judgment* of a court of law against the owner. The debtor was always allowed to alienate his goods until the writ of execution was issued; although by a fiction of law, all judicial proceedings, writs of execution included, formerly related back to the first day of the term to which they belonged (*d*). Goods, therefore, which had been sold after the first day of a term, might yet practically have been seized under a writ of

Writ of fieri facias.

(*a*) Stat. 13 Edw. I. c. 18, called the Statute of Westminster the Second. See Principles of the Law of Real Property, 63, 2nd ed.; 66, 3rd and 4th eds.; 71, 5th ed.; 75, 6th ed.; 78, 7th and 8th eds.; 81, 9th ed.; 82, 10th ed.

(*b*) Bac. Abr. tit. Execution (C).

(*c*) Stat. 32 & 33 Vict. c. 71, s. 6, par. (5).

(*d*) Com. Dig. tit. Execution (D 2); *Anon.*, 2 Vent. 218. See 2 Sugd. Vend. & Pur. 9th ed. 198.

fi. fa. relating back to that day, but subsequently issued.

Statute of Frauds.

To remedy this evil, it was enacted by one of the sections of the Statute of Frauds (*e*), that no writ of *fieri facias* or other writ of execution shall bind the property of the goods against which it is sued, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroner, to be executed; and the officer is required, upon receipt of the writ, to indorse on it (without fee) the day of the month and year on which he received it. Goods and chattels might therefore be safely alienated, although judgment might exist against the owner, provided a writ of execution were not actually in the hands of the sheriff.

New enactment.

And a recent statute now provides that no writ of execution shall prejudice the title to goods acquired by any person *bonâ fide*, and for a valuable consideration, before the actual seizure thereof by virtue of such writ; provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ under which the goods might be seized, had been delivered to the officer and remained unexecuted in his hands (*f*). It has been decided that an alienation to secure or satisfy another creditor is not void within the above-mentioned statute of the 13 Elizabeth (*g*), although made with the intention of defeating an expected execution of the judgment creditor (*h*).

Levari facias.

Besides the sale of goods under the writ of *fieri facias*, there might also be a writ of *levari facias*, now disused, by which the sheriff levied the corn and other present profit which grew on the lands, together with the rents then due, and the cattle thereon (*i*).

Elegit.

And by the writ of *elegit*, the goods of the debtor are delivered to his

(*e*) Stat. 29 Car. II. c. 3, s. 16.

(*f*) Stat. 19 & 20 Vict. c. 97, s. 1. See *Hobson* v. *Thelluson*, L. Rep., 2 Q. B. 642, *qu.?*

(*g*) Stat. 13 Eliz. c. 5.

(*h*) *Wood* v. *Dixie*, 7 Q. B. 892; *Hale* v. *Saloon Omnibus Company*, 4 Drew. 492.

(*i*) 2 Wms. Saunders, 68 a, n. (1).

creditor at an appraised value, together with possession of his lands (*k*). It has however been enacted, that the wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade (not exceeding in the whole the value of five pounds), shall not be liable to seizure under any execution or order of any court against his goods and chattels (*l*). And the Common Law Procedure Act, 1860, now provides, that where goods or chattels have been seized in execution by a sheriff or other officer under process of the superior courts of common law, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels by way of security for a debt, the court or a judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such court or judge may seem just (*m*).

The court may order a sale.

Choses in possession are also liable to involuntary alienation on the bankruptcy of their owner. In this event, all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance, except property held by him on trust for any other person, and except the tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, of twenty pounds in the whole, vest first in the registrar of the Court of Bank-

Bankruptcy.

Property now vests in the trustee.

(*k*) *Pullen* v. *Purbecke*, 1 Ld. Raym. 346. See the present forms of this writ and of the writ of fi. fa., 9 Adol. & Ell. 986 *et seq.*, 5 New Cases, 366 *et seq.*

(*l*) Stat. 8 & 9 Vict. c. 127, s. 8.

(*m*) Stat. 23 & 24 Vict. c. 126, s. 13.

Under previous act property vested in assignees.

ruptcy, and then in the trustee appointed by the creditors under the Bankruptcy Act, 1869 (*n*). Under the previous bankruptcy act the property of the bankrupt vested first in the official assignee, and then in the creditors' assignees (*o*). And in order to prevent traders from obtaining false credit from the possession of property which was not their own, it was provided by the former bankruptcy acts (*p*), that if any bankrupt at the time he became bankrupt should by the consent and permission of the true owner thereof have in his *possession, order, or disposition*, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration or disposition as owner, the Court of Bankruptcy should have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. But it was held that, until an order for the sale of such goods had been made by the court, no property in them vested in the assignees (*q*), and the order was required to specify the particular goods which were to be sold (*r*). The above provision was apparently extended by the Bankruptcy Act, 1851 (*s*), to all persons whether traders or not. And now by the Bankruptcy Act, 1869 (*t*), the property of the bankrupt divisible amongst his creditors comprises

Goods in the possession, order or disposition of a bankrupt.

Bankruptcy Act, 1869.

(*n*) Stat. 32 & 33 Vict. c. 71, ss. 17, 83, paragraph (6). See *post*, the chapter on Bankruptcy.

(*o*) Stat. 24 & 25 Vict. c. 134, ss. 108, 117.

(*p*) Stats. 6 Geo. IV. c. 16, s. 72; 1 & 2 Will. IV. c. 56, s. 7; 5 & 6 Vict. c. 122, s. 59 *et seq.*, repealed and consolidated by stat. 12 & 13 Vict. c. 106, s. 125; *Hamilton* v. *Bell*, 10 Ex. Rep. 545; 18 Jur. 1109; *Reynolds* v. *Hall*, 4 H. & N. 519; *Holderness* v. *Rankin*, 2 De G., F. & J. 258.

(*q*) *Heslop* v. *Baker*, 6 Ex. Rep. 740; 15 Jur. 684. See *Ex parte Heslop*, 1 De G., M. & G. 477; *Ex parte Wood*, 4 De G., M. & G. 861; *Ex parte Young*, 4 De G., M. & G. 864.

(*r*) *Quartermaine* v. *Bittleston*, 13 C. B. 133; *Fielding* v. *Lee*, 18 C. B., N. S. 499.

(*s*) Stat. 24 & 25 Vict. c. 134, s. 232.

(*t*) Stat. 32 & 33 Vict. c. 71, s. 15, par. (5).

all goods and chattels being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt, *being a trader*, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; provided that things in action (*u*), other than debts due to him in the course of his trade or business, shall not be deemed goods and chattels within the meaning of this clause.

(*u*) *Ex parte Union Bank of Manchester, in re Jackson*, L. R., 12 Eq. 354.

CHAPTER IV.

OF SHIPS.

Shipping Acts

THERE is one important class of choses in possession which the policy of the law has rendered subject to peculiar rules, namely, ships and vessels. The whole of the acts relating to Merchant Shipping were repealed by the Merchant Shipping Repeal Act, 1854 (*a*), and the law on this subject is now contained in the Merchant Shipping Act, 1854 (*b*), as amended by the Merchant Shipping Act Amendment Acts, 1855 (*c*) and 1862 (*d*), and the Merchant Shipping Acts, 1871 (*e*) and 1872 (*f*). Every British ship, with a few unimportant exceptions, is required to be registered (*g*), and no ship is to be deemed a British ship unless she belongs wholly to natural-born British subjects, or to persons made denizens or duly naturalized. But no natural born subject who has taken the oath of allegiance to any foreign state can be owner, unless he has subsequently taken the oath of allegiance to her Majesty, and continues during his ownership resident within her Majesty's dominions, or, if not so resident, member of a British factory, or partner in a house actually carrying on business within her Majesty's dominions. And every denizen and naturalized person must continue during his ownership resident within her Majesty's dominions, or, if not so resident, must be a member of a British factory, or partner in such a house of business as above mentioned; and nothing contained in the Naturalization

British ships.

(*a*) Stat. 17 & 18 Vict. c. 120.
(*b*) Stat. 17 & 18 Vict. c. 104.
(*c*) Stat. 18 & 19 Vict. c. 91.
(*d*) Stat. 25 & 26 Vict. c. 63.
(*e*) Stat. 34 & 35 Vict. c. 110.
(*f*) Stat. 35 & 36 Vict. c. 73.
(*g*) Stat. 17 & 18 Vict. c. 104, s. 19. As to colonial shipping, see stat. 31 & 32 Vict. c. 129.

Act, 1870 (*h*), is to qualify an alien to be the owner of a British ship (*i*). But bodies corporate established under and subject to the laws of the United Kingdom or any British possession, and having their principal place of business therein, may be owners (*k*). The registration is made by the collector, comptroller or other principal officer of customs for the time being at any port or other place in the United Kingdom approved by the commissioners of customs for the registry of ships, and by other officers in the colonies and possessions abroad (*l*).

Property in British ships divided into sixty-four shares.

The property in every ship is divided into sixty-four shares; and, subject to the provisions of the act with respect to joint owners or owners by transmission, not more than thirty-two individuals shall be entitled to be registered at the same time as owners of any one ship; but this rule is not to affect the beneficial title of any number of persons, or of any company, represented by or claiming under any registered owner or joint owner. And no person is entitled to be registered as owner of any fractional part of a share in a ship; but any number of persons not exceeding five may be registered as joint owners of a ship, or of a share or shares therein. And joint owners are to be considered as constituting one person only, as regards the foregoing rule relating to the number of persons entitled to be registered as owners, and shall not be entitled to dispose in severalty of any interest in any ship, or in any share or shares therein, in respect of which they are registered. A body corporate may be registered as owner by its corporate name (*m*).

No trusts entered on the register.

No notice of any trust, express, implied, or constructive, shall be entered in the register book or receivable by

(*h*) Stat. 33 Vict. c. 14; *ante*, p. 46.
(*i*) Sect. 14.
(*k*) Stat. 17 & 18 Vict. c. 104, s. 18.
(*l*) Sect. 30.
(*m*) Sect. 37.

the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of any ship, or share therein, shall have power absolutely to dispose of such ship or share in the manner prescribed by the act, and to give effectual receipts for any money paid or advanced by way of consideration (*n*). But the intention of the act is, that, without prejudice to the provisions contained in the act for preventing notice of trusts from being entered on the register, and without prejudice to the powers of disposition and of giving receipts conferred by the act on registered owners and mortgagees, and without prejudice to the provisions contained in the act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property (*o*). Upon the completion of the registry of any ship, the registrar gives a certificate of registry in the form prescribed by the act. And whenever any change takes place in the registered ownership of any ship, then if such change occurs when the ship is at her port of registry, a memorandum of such change is forthwith indorsed by the registrar on the certificate of registry. But if the ship is absent from her port of registry, then, upon her first return to such port, the master must deliver the certificate of registry to the registrar, and he is to indorse thereon a like memorandum of the change. Or if she previously arrives at any port where there is a British registrar, such registrar shall, upon being advised by the registrar of her port of registry of the change having taken place,

But equities may be enforced.

Certificate of registry.

(*n*) Stat. 17 & 18 Vict. c. 104, s. 43.

(*o*) Stat. 25 & 26 Vict. c. 63, s. 3. See *Ward* v *Beck*, C. P., 9 Jur., N. S. 912; 13 C. B., N. S. 668; *Stapleton* v. *Haymen*, 2 Hurlst. & Colt. 918.

indorse a like memorandum thereof on the certificate of registry, and may for that purpose require the certificate to be delivered to him, so that the ship be not thereby detained (*p*). Provision is also made for the granting of a new certificate in the place of any which may be delivered up, or may be mislaid, lost or destroyed (*q*). The certificate of registry is to be used only for the navigation of the ship, and is kept in the custody of the master, and is not subject to detention by reason of any title, lien, charge, or interest whatsoever which any owner, mortgagee or other person may have or claim to have in the ship described in such certificate (*r*).

Transfer of ships.

A registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, must be transferred by bill of sale, and such bill of sale must contain such a description of the ship as is contained in the surveyor's certificate, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and must be according to the form set out in the schedule to the act, or as near thereto as circumstances permit, and must be executed by the transferor in the presence of and be attested by one or more witnesses (*s*). And in case any bill of sale, mortgage or other instrument for the disposal or transfer of any ship or any share or interest therein, is made in any form or contains any particulars other than the form and particulars prescribed and approved for the purpose by or in pursuance of the Merchant Shipping Act, 1854, no registrar shall be required to record the same without the express direction of the commissioners of her Majesty's customs (*t*). And no individual can be registered as transferee of a ship, or of any share therein,

(*p*) Stat. 17 & 18 Vict. c. 104, s. 45.
(*q*) Sects. 47, 48, 53.
(*r*) Sect. 50.
(*s*) Sect. 55.
(*t*) Stat. 18 & 19 Vict. c. 91, s. 11.

until he has made a declaration in a prescribed form, stating his qualification to be registered as owner of a share in a British ship. And if a body corporate be transferee, the secretary or other duly appointed public officer of such body corporate must make a similar declaration (*u*). The bill of sale, together with the required declaration, must then be produced to the registrar of the port at which the ship is registered, who thereupon enters in the register the name of the transferee as owner of the ship or share comprised in the bill of sale, and also indorses on the bill of sale the fact of such entry having been made, with the date and hour thereof. All bills of sale are entered in the register book in the order of their production to the registrar (*x*).

Mortgage of ships.

All mortgages of any ship, or share therein, are to be in a form prescribed by the act, or as near thereto as circumstances permit; and on the production of such instrument, the registrar of the port at which the ship is registered is to record the same in the register book (*y*). Every such mortgage is to be recorded by the registrar in the order of time in which the same is produced to him for that purpose, and the registrar shall by memorandum under his hand notify on the instrument of mortgage that the same has been recorded by him, stating the day and hour of such record (*z*). If there is more than one mortgage registered, the mortgagees are entitled to priority one over the other according to the date at which each instrument is recorded in the register book, and not according to the date of each instrument itself, notwithstanding any express, implied or constructive notice (*a*). No mortgagee is to be deemed by reason of his mortgage

(*u*) Stat. 17 & 18 Vict. c. 104, s. 56.
(*x*) Sect. 57.
(*y*) Sect. 66.
(*z*) Sect. 67.
(*a*) Sect. 69.

to be the owner of a ship, or of any share therein, nor is the mortgagor to be deemed to have ceased to be owner, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt (*b*). Every registered mortgagee is to have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but if more persons than one are registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee (*c*). Mortgages of ships are not to be affected by the bankruptcy of the mortgagor (*d*); and a form is provided for the transfer of mortgages (*e*). And whenever any registered mortgage shall have been discharged, the registrar, on production of the mortgage deed with a receipt for the mortgage money indorsed thereon, duly signed and attested, makes an entry of the discharge of such mortgage in the register book; and upon such entry being made, the estate, if any, which passed to the mortgagee, vests in the same persons in whom the same would (having regard to intervening acts and circumstances, if any) have vested if no such mortgage had ever been made (*f*).

discharge of Mortgage

Provision is made enabling any registered owner to empower any other person or persons to sell any entire ship, or to mortgage any ship or any share therein, at

(*b*) Sect. 70. See *European Co.* v. *Royal Mail Co.*, 4 K. & J. 676; *Dickinson* v. *Kitchen*, 8 E. & B. 789; *Marriott* v. *The Anchor Reversionary Company, Limited*, 2 Giff. 457; *Collins* v. *Lamport*, L. C., 11 Jur., N. S. 1; 13 W. R. 283; 34 L. J., Chan. 196; *Rusden* v. *Pope*, 37 L. J., N. S., Exch. 137; Law Rep., 3 Exch. 269.

(*c*) Stat. 17 & 18 Vict. c. 104, s. 71.

(*d*) Sect. 72.

(*e*) Sect. 73.

(*f*) Sect. 68.

Certificates of sale and mortgage.

any place out of the country or possession in which the port of registry of the ship is situate. For this purpose what are called certificates of sale or mortgage are granted by the registrar on certain conditions mentioned in the act, and in forms set out in the schedule thereto (*g*). The above are the principal provisions of the act so far as relate to the conveyance of ships. For more particular information the reader must be referred to the acts themselves, which are of great length.

Exempt from stamp duty.

It may, however, be added, that all instruments used in carrying into effect that part of the act which relates to British ships, their ownership and registry, are exempt from stamp duty (*h*).

Jurisdiction of the High Court of Admiralty.

The Admiralty Court Act, 1861 (*i*), confers on the High Court of Admiralty jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment and earnings of any ship registered in any port in England or Wales, or any share thereof; and it empowers that court to settle all accounts outstanding and unsettled between the parties in relation thereto, and to direct the ship or any share thereof to be sold, and to make such order in the premises as to the court shall seem fit (*k*). The same act also gives the Court of Admiralty jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854 (*l*). Some of the county courts now possess Admiralty jurisdiction (*m*).

County courts.

Charter-party.

Sometimes a vessel is hired for a given voyage. The instrument by which such hiring is effected is termed a

(*g*) Stat. 17 & 18 Vict. c. 104, s. 76 *et seq.* See *Orr* v. *Dickinson*, 1 John. 1.

(*h*) Stat. 17 & 18 Vict. c. 104, s. 9.

(*i*) Stat. 24 Vict. c. 10.

(*k*) Sect. 8.

(*l*) Sect. 11. See also sects. 10, 12 and 13.

(*m*) Stats. 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.

charter-party (*n*). Whether the legal possession of the ship passes to the hirer (or charterer, as he is called) depends on the stipulations contained in the charter-party, such as whether the charterer or the owner is to provide the seamen, and keep the vessel in order (*o*). Where a merchant ship is open to the conveyance of goods generally, it is called a *general ship*. The receipt for the goods given by the master is called the *bill of lading*: it states that the goods are to be delivered to the consignee or his assigns; and by the custom of merchants, the bill of lading, when indorsed by the consignee with his name, becomes a negociable instrument, the delivery of which passes the property in the goods (*p*); but it was formerly held that the right to sue upon the contract contained in the bill of lading to carry and deliver the goods did not pass by the indorsement (*q*). It is, however, now enacted, that every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself (*r*). The money payable for the hire of a ship, or for the carriage of goods in it, is the *freight* which, whether accrued or accruing, is assignable in the same manner as any other ordinary chose in action (*s*).

General ship.

Bill of lading.

Freight.

(*n*) The stamp duty on a charter-party is now sixpence. Stat. 28 & 29 Vict. c. 96, s. 7; repealed by stat. 33 & 34 Vict. c. 99, and re-enacted by stat. 33 & 34 Vict. c. 97, Schedule, tit. Charter-party, and see sects. 66, 67 and 68.

(*o*) *Dean* v. *Hogg*, 10 Bing. 345; *Fenton* v. *City of London Steam Packet Company*, 8 Ad. & Ell. 835.

(*p*) *Caldwell* v. *Ball*, 1 T. Rep. 205, 216.

(*q*) *Thompson* v. *Dominy*, 14 Mee. & Wels. 403.

(*r*) Stat. 18 & 19 Vict. c. 111, s. 1.

(*s*) *Douglas* v. *Russell*, 4 Sim. 524; 1 M. & K. 488; *Leslie* v. *Guthrie*, 1 New Cases, 697; *Lindsay* v. *Gibbs*, 22 Beav. 522.

Right of mortgagee to freight.

But in the case of a mortgage of a ship, the mortgagee whose mortgage is first registered, obtains, by taking actual (*t*) or constructive (*u*) possession, a legal right to the freight, with all the advantages which equity gives to a legal owner, in the event of a conflict of claims (*x*). The delivery of goods imported from foreign parts, and the lien of the ship owner for their freight, are now regulated by the provisions of the Merchant Shipping Act Amendment Act, 1862 (*y*).

(*t*) *Brown* v. *Tanner*, Law Rep., 3 Ch. Ap. 597.

(*u*) *Rusden* v. *Pope*, Law Rep., 3 Ex. 269.

(*x*) *Liverpool Marine Credit Company* v. *Wilson*, Law Rep., 7 Ch. Ap. 507; *Wilson* v. *Wilson*, V.-C. M., Law Rep., 14 Eq. 32.

(*y*) Stat. 25 & 26 Vict. c. 63, ss. 66—78.

PART II.

OF CHOSES IN ACTION.

CHAPTER I.

OF ACTIONS EX DELICTO.

In addition to moveable goods, or *choses in possession*, we have observed (*a*), that there existed also in ancient times *choses in action*, or the liberty of proceeding in the courts of law either to recover pecuniary damages for the infliction of a wrong or the nonperformance of a contract, or else to procure the payment of money due. The actions to be thus brought were, of course, not real, but purely personal actions. Real actions were brought for the recovery of land or real property; but the above-mentioned actions were against persons only, and the object was merely to obtain from them money, being the only recompense then generally available. In this respect, however, the law has recently undergone some change: for the Common Law Procedure Act, 1854, now enables the plaintiff in any action, except replevin and ejectment, in any of the superior courts, to claim a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested, and by the nonperformance of which he may sustain damage (*b*). And it also provides, that in all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may claim a writ of injunction against the

Writ of mandamus.

Writ of injunction.

(*a*) *Ante*, p. 4.

(*b*) Stat. 17 & 18 Vict. c. 125, ss. 68, 69; *Norris* v. *Irish Land Company*, 8 E. & B. 512.

repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right (*c*); and the Common Law Procedure Act, 1860, requires that in the above cases the costs of the writ of mandamus or injunction shall be paid by the defendant, unless otherwise ordered by the court or a judge (*d*). But the rights thus given do not appear to have materially interfered with the wider and more ancient jurisdiction of the Court of Chancery in issuing an *injunction* to restrain the wrong-doer from continuing his wrong, or in decreeing the *specific performance* of a contract. By a recent statute the Court of Chancery is empowered to award pecuniary damages, either in addition to or in substitution for an injunction or specific performance (*e*). In many cases, however, money alone is a sufficient recompense; and then the right to bring an action at law, in other words a legal chose in action, constitutes a valuable kind of personal property.

Costs.

The infliction of a wrong, and the nonperformance of a contract, are evidently the two grand sources from which personal actions ought to proceed. If one man commits a wrong against another, justice evidently requires that he should give him satisfaction; and if one man enters into a contract with another, he certainly ought to keep it, or make reparation for its breach; or if the contract be to pay a sum of money, the money ought to be duly paid. Personal actions are accordingly divided by the law of England into two great classes, actions *ex delicto*, and actions *ex contractu* (*f*). The former arises in respect of a wrong committed, called

Actions ex delicto and ex contractu.

(*c*) Stat. 17 & 18 Vict. c. 125, ss. 79—82.

(*d*) Stat. 23 & 24 Vict. c. 126, s. 32.

(*e*) Stat. 21 & 22 Vict. c. 27, s. 2; *Levers* v. *Earl of Shaftesbury*, V. C. W., 2 Law Rep., Eq. 270.

(*f*) 3 Black. Com. 117.

in law French a *tort;* the latter, in respect of a contract made for the performance of some action, which thus becomes a *duty*, or for the payment of some money, which thus becomes a *debt.* Let us consider, in the present chapter, the right of action which occurs *ex delicto*, or in respect of a *tort.*

The ancient law, in its dread of litigation, confined the remedy by action for a *tort* or wrong committed, to the joint lives of the injurer and the injured. If either party died, the right of action was at an end, the maxim being *actio personalis moritur cum personâ* (*g*). In this rule, actions *ex delicto* only were included; of which, however, there seem to have been more than any other in early times. But, by an early statute (*h*), the same action was given to the executor for any injury done to the personal estate of the deceased in his lifetime, whereby it became less beneficial to the executor, as the deceased himself might have brought in his lifetime. And by a modern statute (*i*), an action is given to the executors or administrators of any person deceased for any injury to the real estate of such person, committed within six calendar months before his death, for which an action might have been maintained by him; so that the action be brought within one year after the death of such person; and the damages, when recovered, are to be part of the personal estate of such person. And by a later statute (*k*), it is provided, that whenever the death of a person shall be caused by such wrongful act, neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action

Maxim actio personalis moritur cum personâ.

Exceptions on death of the party injured.

(*g*) 1 Wms. Saund. 216 a, n. (1).

(*h*) Stat. 4 Edw. III. c. 7, *de bonis asportatis in vitâ testatoris*, extended to executors of executors by stat. 15 Edw. III. c. 5.

(*i*) Stat. 3 & 4 Will. IV. c. 42, s. 2.

(*k*) Stat. 9 & 10 Vict. c. 93, amended by stat. 27 & 28 Vict. c. 95. See *Pym* v. *The Great Northern Railway Company*, 2 Best & Smith, 759.

and recover damages in respect thereof, the wrong-doer shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. Under this act, one action only can lie for the same subject-matter of complaint; and such action must be commenced within twelve calendar months after the death of the deceased (*l*), in the name of his executor or administrator (*m*), and must be for the benefit of the wife, husband, parents, grandfather and grandmother, stepfather and stepmother, children, grandchildren and stepchildren of the deceased, in such shares as the jury shall direct (*n*). And if there shall be no executor or administrator of the person deceased, or, there being such executor or administrator, no action shall have been brought in his name within six calendar months from the death of the deceased, then such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by or in the name of such executor or administrator (*o*). Previously to this statute, a man who had been maimed by another could recover compensation for the injury; but if he died of his wound, his family could obtain no recompense for the loss of a

(*l*) Stat. 9 & 10 Vict. c. 93, s. 3.

(*m*) Sect. 2.

(*n*) Sects. 2, 5. This act is a specimen of the common absurdity of modern acts of parliament, in introducing an interpretation clause in one section just to vary the meaning of another. It enacts in one section that the action shall be for the benefit of the wife, husband, parent and child; and in another section that the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter. Now the words "parent" and "child" occur only in the one place just mentioned besides this interpretation clause. Why not therefore say at once what is really intended?

(*o*) Stat. 27 & 28 Vict. c. 95, s. 1.

life which might have been their only dependence. And even now, when the death of a person is not *caused*, no action can be brought by his executor or administrator for any injury which affected him personally, if it did not touch his property. Thus it has been held, that an executor or administrator cannot have an action for a breach of promise of marriage with the deceased, where no special damage can be stated to have accrued to her personal estate (*p*).

Death of the wrong-doer.

Not only the death of the injured party, but also that of the wrong-doer, formerly put an end to every action which arose from a *tort* or wrong; and this was the case up to a very recent period; although if the executor or administrator had profited by the wrong done, the injured party was able to recover from him the money or goods he had thus gained (*q*). But by a modern statute (*r*) an action may now be maintained against the executors or administrators of any person deceased, for any wrong committed by him within six calendar months before his death against another person, in respect of his property real or personal; so as such action be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person. And the damages to be recovered in such action are to be payable in the like order of administration as the simple contract debts of such person. The remedy afforded by this statute does not preclude such action as might have previously been brought against the executor or administrator (*s*).

Action for dilapidations.

There is one peculiar action founded on *tort*, to which, from the nature of the case, the deceased him-

(*p*) *Chamberlain* v. *Williamson*, 2 Mau. & Sel. 408, 415.

(*q*) *Powell* v. *Rees*, 7 Ad. & El. 426.

(*r*) Stat. 3 & 4 Will. IV. c. 42, s. 2.

(*s*) *Powell* v. *Rees*, ubi supra.

self could not be liable, but which was maintainable formerly by the common law, and is now maintainable by statute (*t*) against his executors or administrators. This is the action for dilapidations of the houses or buildings on a benefice; and it is brought by the new incumbent, whether of a rectory, vicarage or perpetual curacy, endowed public chapel or parochial chapelry or district (*u*), against the executors or administrators of his predecessor. This action was formerly no exception to the rule *actio personalis moritur cum personâ*, for the deceased was not liable during his lifetime; the plaintiff was the succeeding incumbent; and an action could not be said to die which never had or could have any existence (*x*). However, in the case of resignation or exchange, the preceding incumbent was himself liable for dilapidations (*y*). But the Ecclesiastical Dilapidations Act, 1871 (*z*), now provides for the appointment of a surveyor of ecclesiastical dilapidations (*a*), who may be directed to inspect the buildings of a benefice (*b*), and it will be the duty of the incumbent to execute the repairs prescribed in his report (*c*). In estimating the sum to be recovered in an action for dilapidations, the rule is as follows:—The incumbent is bound to maintain the parsonage, farm buildings, and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; and he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and white-

Surveyor.

Liability of incumbent.

(*t*) The Ecclesiastical Dilapidations Act, 1871, stat. 34 & 35 Vict. c. 43, amended by stat. 35 & 36 Vict. c. 96.

(*u*) Stat. 34 & 35 Vict. c. 43, s. 3.

(*x*) *Sollers* v. *Lawrence*, Willes, 421.

(*y*) *Downes* v. *Craig*, 9 Mee. & Wels. 166.

(*z*) Stat. 34 & 35 Vict. c. 43.

(*a*) Sect. 8.

(*b*) Sect. 12.

(*c*) Sect. 19.

washing and papering belong (*d*). And no damages can be recovered on account of neglect to cultivate the glebe lands in a husbandlike manner (*e*). If the incumbent commit any act of waste, such as could not be committed by any ordinary tenant for life (*f*), he may be restrained by an injunction out of the Court of Chancery (*g*); but it has recently been decided that his executors will not be liable in an action for dilapidations for waste committed by him in digging gravel in pits which were opened by his predecessor (*h*). Whether they would be liable if the incumbent himself opened the pits appears doubtful (*i*). When any part of the premises was in the occupation of a tenant who was liable to repair, the executors of the incumbent were exempt from liability by the ancient canon law (*k*). And the Ecclesiastical Dilapidations Act, 1871 (*l*), accordingly exempts from its provisions buildings, if any, belonging to a benefice which shall be comprised in any lease for years or lives for the time being subsisting, except so far as the lessee shall not, by virtue of such lease, be liable to insure, rebuild or repair such buildings. The new incumbent was formerly bound to expend within two years the money recovered by him for dilapidations in the necessary repairs of the premises (*m*). But he is now bound forthwith to pay the money recovered to the governors of Queen Anne's

(*d*) *Wise* v. *Metcalf*, 10 Barn. & Cress. 299.

(*e*) *Bird* v. *Ralph*, 4 Barn. & Adol. 826.

(*f*) See Principles of the Law of Real Property, p. 23, 4th, 5th, 6th, 7th & 8th eds; 24, 9th & 10th eds.

(*g*) *The Duke of Marlborough* v. *St. John*, 5 De Gex & Sm. 174.

(*h*) *Ross* v. *Adcock*, L. Rep., 3 C. P. 655.

(*i*) See *Huntley* v. *Russell*, 13 Q. B. 572; *Ross* v. *Adcock*, ubi supra.

(*k*) Burn's Ecclesiastical Law, vol. 2, p. 148; Lyndewood, Edmundus, p. 250, Oxon, 1629; note of John de Otho to Constitutions of Otho, tit. 17, Improbam, &c.

(*l*) Stat. 34 & 35 Vict. c. 43, s. 58.

(*m*) Stat. 14 Eliz. c. 11, s. 18.

Bounty (*n*), who expend it on the works according to the certificate of the surveyor of dilapidations (*o*). Claims for dilapidations formerly had this peculiarity, that they were not to be satisfied by the executor until after payment of all the debts of the testator, including those merely by simple contract (*p*). But it is now provided that the costs of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such at law or in equity (*q*).

(*n*) Stat. 34 & 35 Vict. c. 43, s. 37.

(*o*) Sect. 44.

(*p*) *Bryan* v. *Clay*, 1 E. & Black. 38. But as to equitable assets, see *Bissett* v. *Burgess*, 23 Beav. 278.

(*q*) Stat. 34 & 35 Vict. c. 43, s. 36.

CHAPTER II.

OF CONTRACTS.

PERSONAL actions, we have observed (*a*), may be brought not only on account of the infliction of a wrong, but also to recover pecuniary damages for the nonperformance of a contract, or to procure the payment of money due, if the payment of a specific sum be the subject of the contract. As the payment of money is the law's ultimate remedy in personal actions, an action for a given debt will be effectually satisfied by a judgment that the plaintiff do recover his debt; and this is the judgment accordingly given in an action of debt, which lies for the recovery of a specific sum due from the defendant to the plaintiff (*b*). But when no specific sum is claimed, the action can only, in the law phrase, *sound in damages;* and the amount of the damages to be recovered must, until recently, have been assessed by a jury according to the injury sustained (*c*). But the Common Law Procedure Act, 1852, now provides, that, in actions in which it shall appear to the court or a judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, the court or a judge may direct that the amount for which final judgment is to be signed shall be ascertained by one of the masters of the court (*d*); and further, that, in all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a

Action of debt.

Actions which sound in damages.

New enactment.

(*a*) *Ante*, p. 4.
(*b*) Stephen on Pleading, 116.
(*c*) *Ibid.* p. 117.
(*d*) Stat. 15 & 16 Vict. c. 76, s. 94.

Liquidated damages.

debt or damages (*e*). It is, however, competent to the parties to a contract to agree between themselves, that, in the event of a breach by either party, a given sum shall be recovered from him by the other as stipulated or liquidated damages; and in this case the whole of the sum thus agreed on may, on a breach of the contract, be recovered from the defaulter (*f*). The sum so agreed on is not properly called a penalty; for, as we shall see hereafter when speaking of bonds, the law regards a penalty as a security only for the damage actually sustained; although the use of the word *penalty* will not prevent the whole sum from being recovered, if this be clearly the intention (*g*). But where a sum of money is stipulated to be recovered as liquidated damages in case of the breach of an agreement to do several acts, and such sum will, in case of breaches of the agreement, be in some instances too large and in others too small a compensation for the injury occasioned, such sum will not be allowed to be recovered in case of any breach, but damages only, proportioned to the actual injury which the breach has occasioned (*h*). In such a case, if the parties wish to bind themselves to pay liquidated damages, they must contract in clear and express terms, that for the breach of each and every stipulation contained in the agreement a sum certain is to be paid; and in that case, although the stipulations may be of various degrees of importance, the parties will be held to their contract (*i*).

(*e*) Stat. 15 & 16 Vict. c. 76, s. 95.

(*f*) *Reilly* v. *Jones*, 1 Bing. 302; S. C. 8 Moore, 244; Sugd. Vend. & Pur. 221, 11th ed.; *Leighton* v. *Wales*, 2 Mee. & Wels. 545; *Price* v. *Green*, 16 M. & W. 346, 354; *Galsworthy* v. *Strutt*, 1 Exch. Rep. 659; *Atkyns* v. *Kinnier*, 4 Exch. Rep. 776.

(*g*) *Sainter* v. *Ferguson*, 7 C. B. 716; *Sparrow* v. *Paris*, 7 H. & N. 594.

(*h*) *Kemble* v. *Farren*, 6 Bing. 141; S. C. 3 Moo. & Pay. 425; *Davies* v. *Penton*, 6 Bar. & Cress. 216, 223; S. C. 9 Dowl. & Ry. 369; *Horner* v. *Flintoff*, 9 Mee. & Wels. 678, 681; *Reindel* v. *Schell*, 4 Scott, N. S. 97; *Betts* v. *Burch*, 4 H. & N. 506.

(*i*) *Per* Parke, B., 9 Mee. &

So much then for the legal remedies for a breach of contract. Let us now inquire more particularly of what a contract itself consists. A contract then, as defined by Blackstone (*k*), is "an agreement upon sufficient consideration to do or not to do a particular thing." This agreement may be either express or implied; for the law always implies a promise to do that which a person is legally liable to perform, and the action of *assumpsit* on promises is constantly maintained for damages for the breach of such an implied contract (*l*). Thus a person who takes the goods of a tradesman is liable in *assumpsit* for their market value: for, as he took the goods, the law will imply for him a promise to pay for them. So a person who employs another to work for him impliedly contracts to give him reasonable remuneration; and a man who borrows money impliedly promises to repay it. And in all these cases the plaintiff, until recently, plainly stated that the defendant promised the plaintiff to pay him the money on request, and that the defendant had disregarded his promise, and had not paid the same monies or any part thereof. But the Common Law Procedure Act, 1852, now requires that all statements of this kind shall be omitted (*m*).

Definition of a contract.

Implied promise.

Assumpsit.

Express contracts are either by parol, or word of mouth, which are called *simple contracts*, or by deed under seal, which are called *special contracts* (*n*); although simple contracts may, and often must at the present day, be evidenced by writing. Let us consider first mere parol or simple contracts. A parol contract then is an agreement by word of mouth, upon sufficient

Parol or simple contract.

Wels. 680. See *Atkyns* v. *Kinnier*, 4 Exch. Rep. 776; *Mercer* v. *Irving*, 1 E. B. & E. 563.

(*k*) 2 Bla. Com. 442.

(*l*) Stephen on Pleading, 18.

(*m*) Stat. 15 & 16 Vict. c. 76, s. 49.

(*n*) *Rann* v. *Hughes*, 7 T. R. 351, n.

Consideration necessary.

consideration, to do or not to do a particular thing. According to the law of England a *consideration* is an essential ingredient in every contract: a promise without a consideration is regarded as *nudum pactum*, and no recompense can be recovered for its breach (*o*), neither will its performance be enforced in a court of equity (*p*). Thus if a man promise to give me 100*l.* without any consideration, he is not bound to perform his promise, and I am without remedy if he should break his word. So even if I should have done him any service, his subsequent promise to pay me money, or otherwise benefit me, for a consideration already executed on my part, will not be binding, unless I should have done him the service at his request, in which case the promise will relate back to the request (*q*), or unless a request can be implied from a subsequent allowance of the service, or from other circumstances (*r*); and if the service rendered be of such a nature that the law will imply a promise in respect of it, any subsequent express promise different from that which the law will imply will be void as *nudum pactum* (*s*). And if the service, or any part of it, has been illegal from being contrary to the common law or to any statute, such illegal consideration will not support a promise. Thus a promise made in consideration that the other party had published a libel at the request of the person making the promise, and had also at the like request incurred certain costs, was held void on account of the illegality of part of the consideration, namely,

Consideration executed.

Illegal consideration executed.

(*o*) Doctor & Student, dial. 2, c. 24; 2 Bla. Com. 445.

(*p*) 1 Fonb. Eq. 335 *et seq.*; *Dipple* v. *Corles*, 11 Hare, 183.

(*q*) *Hunt* v. *Bate*, Dyer, 272 a; *Lampleigh* v. *Brathwait*, Hob. 105; 1 Smith's Leading Cases, 67; *Powle* v. *Gunn*, 4 N. C. 445, 448; *Eastwood* v. *Kenyon*, 11 Ad. & Ell. 438, 451; S. C. 3 Per. & Dav. 282; 1 Wms. Saund. 264, n. (1).

(*r*) The maxim is *omnis ratihabitio retrotrahitur et mandato æquiparatur:* 1 Wms. Saund. 264 b, n. (*e*).

(*s*) *Hopkins* v. *Logan*, 5 Mee. & Wels. 241, 247.

publishing the libel, which vitiated the whole (*t*). And in like manner the circumstance of a woman's having cohabited with a man is not of itself a valid consideration to support a promise made by him to pay her a sum of money (*u*).

Considerations are divided in law into two classes, *good* (sometimes called meritorious) and *valuable*. A good consideration is that of *blood*, or the natural love and affection which a person has to his children, or any of his relatives (*x*). A valuable consideration may be either pecuniary, namely, the payment of money; or the gift or conveyance of anything valuable; or it may be the consideration of the marriage of the party himself or of any relative (*y*); or the compromise of a bonâ fide claim (*z*); or any act of one party from which the other, or any stranger at his request, express or implied, derives any advantage; or any labour, detriment, inconvenience or risk sustained by the one party, if such labour be performed, or such detriment, inconvenience or risk be suffered by the one party at the request, express or implied, of the other, although such other may himself derive no actual benefit (*a*). A good consideration is not of itself sufficient to support a promise, any more than the moral obligation which arises from a man's passing his word; neither will the two together make a binding contract; thus a promise by a father to make a gift to his child will not be enforced against

Considerations good or valuable.

Good.

Valuable.

A *good* consideration insufficient to support a promise.

(*t*) *Shackell* v. *Rosier*, 2 Bing. N. C. 634, 644.

(*u*) *Binnington* v. *Wallis*, 4 B. & Ald. 650, 652. See however *Gibson* v. *Dickie*, 3 Man. & Sel. 463; *Keenan* v. *Handley*, 2 De Gex, Jones and Smith, 283.

(*x*) 2 Black. Com. 297, 444.

(*y*) *Campion* v. *Cotton*, 17 Ves. 263; *Coverdale* v. *Eastwood*, V.-C. B., Law Rep., 15 Eq. 121.

(*z*) *Lucy's case*, 4 De Gex, M. & G. 356; *Cook* v. *Wright*, 1 Best & Smith, 559.

(*a*) Selwyn's Nisi Prius, tit. Assumpsit, 46; 1 Wms. Saund. 211 d, n. (2); 2 Wms. Saund. 137 h, n. (*e*).

him (*b*). The consideration of natural love and affection is indeed good for so little in law, that it is not easy to see why it should be called a *good* consideration; for in law it is considered as not good against creditors within the statute 13 Elizabeth (*c*), in which the very phrase *good consideration* is used; it is not good to support a contract; and a gift for such consideration is regarded as simply voluntary (*d*). The only reason why such a consideration should be called *good* appears to be, that in early times, previously to the passing of the Statute of Uses (*e*), the Court of Chancery enforced a covenant to stand seised of lands to the use of any person of the blood of the covenantor, on account of the goodness of the consideration; whence it has happened that, since that statute, the legal estate (being by that statute annexed to the use (*f*)) will pass to a relative under a covenant to stand seised to his use (*g*). But the rules that anciently governed the Court of Chancery do not now regulate its proceedings (*h*); although modern equity will still interfere in favour of a wife or child in some cases in which it will not interpose on behalf of strangers (*i*).

Valuable consideration necessary to a contract.

A valuable consideration is, therefore, in all cases necessary to form a valid contract. It has indeed been

(*b*) *Jeffery* v. *Jeffery*, 1 Craig & Ph. 138; *Dillon* v. *Coppin*, 4 My. & Cr. 647; *Holloway* v. *Headington*, 8 Sim. 324; *Meek* v. *Kettlewell*, 1 Hare, 464; 1 Phil. 342. See however *Ellis* v. *Nimmo*, Lloyd & Goold, 333.

(*c*) *Twyne's case*, 3 Rep. 80 b; *ante*, p. 50.

(*d*) 2 Black. Com. 297.

(*e*) 27 Hen. VIII. c. 10.

(*f*) Principles of the Law of Real Property, 126 *et seq.*, 2nd ed.; 131, 3rd & 4th eds.; 136, 5th ed.; 143, 6th ed ; 147, 7th ed.; 153, 8th ed.; 154, 9th ed.; 155, 10th ed.

(*g*) *Ibid.* p. 159, 2nd ed.; 164, 3rd ed.; 166, 4th ed.; 173, 5th ed.; 181, 6th ed.; 185, 7th ed.; 194, 8th & 9th eds.; 196, 10th ed.

(*h*) *Ibid.* p. 131, 2nd ed.; 135, 3rd & 4th eds.; 141, 5th ed.; 148, 6th ed.; 151, 7th ed.; 157, 8th ed.; 158, 9th ed.; 159, 10th ed.

(*i*) *Ibid.* p. 239, 2nd ed.; 246, 3rd ed.; 248, 4th ed.; 258, 5th ed.; 270, 6th ed.; 276, 7th ed.; 288, 8th ed.; 286, 9th ed.; 288, 10th ed.

thought than an express promise, founded on a moral obligation is sufficient for this purpose (*k*). This however appears to be a mistake. An express promise can give no original right of action, if the obligation on which it is founded could never have been itself enforced (*l*). But in some cases a valuable consideration, which might have formed a contract by means of an implied promise, had its operation not been suspended by some positive rule of law, may be revived and made available by a subsequent express promise. Thus a debt barred by the debtor's having become bankrupt and obtained his certificate, might formerly have been enforced against him, if, after his bankruptcy, he had expressly promised to pay it (*m*); but such a promise was required, by the modern bankrupt acts (*n*), to be made in writing signed by the bankrupt, or by some person thereto lawfully authorized by him in writing; and the Bankrupt Law Consolidation Act, 1849, rendered all such promises void (*o*); and a similar provision was contained in the Bankruptcy Act, 1861 (*p*). And the Bankruptcy Act, 1869 (*q*), now provides (*r*) that, where a debtor shall be adjudicated a bankrupt, no

Express promise founded on moral obligation insufficient.

Debt barred by bankruptcy.

(*k*) *Lee* v. *Muggeridge*, 5 Taunt. 36. This case may now be considered as virtually overruled by subsequent authorities mentioned in the next note. See however *Dawson* v. *Kearton*, 3 Sma. & Giff. 190, *qu.?*

(*l*) Note to *Wennall* v. *Adney*, 3 Bos. & Pull. 252; *Littlefield* v. *Shee*, 2 Barn. & Adol. 811; *Meyer* v. *Haworth*, 8 Adol. & Ellis, 467; S. C. 3 Nev. & Per. 462; *Monkman* v. *Shepherdson*, 11 Adol. & Ell. 411, 415; S. C. 3 Per. & Dav. 182; *Jennings* v. *Brown*, *per* Parke, B., 9 Mee. & Wels. 501; *Eastwood* v. *Kenyon*, 11 Adol. & Ell. 447; S. C. 3 Per. & D. 276; 2 Wms. Saund. 137 f, n. (*e*); *Beaumont* v. *Reeve*, 8 Q. B. 483.

(*m*) *Trueman* v. *Fenton*, Cowp. 544; *Kirkpatrick* v. *Tattersall*, 13 Mee. & Wels. 766.

(*n*) 6 Geo. IV. c. 16, s. 131; 5 & 6 Vict. c. 122, s. 43.

(*o*) Stat. 12 & 13 Vict. c. 106, s. 204; *Kidson* v. *Turner*, 3 H. & N. 581.

(*p*) Stat. 24 & 25 Vict. c. 134; s. 164, now repealed by stat. 32 & 33 Vict. c. 83.

(*q*) Stat. 32 & 33 Vict. c. 71.

(*r*) Sect. 12.

creditor, to whom the bankrupt is indebted in respect of any debt provable under the bankruptcy, shall have any remedy against the property or person of the bankrupt in respect of such debt, except in manner directed by that act. So a simple contract debt, which would otherwise have been barred by the Statute of Limitations (*s*), from having been incurred upwards of six years, may be revived by a subsequent promise to pay, or even by an unconditional acknowledgment of the debt (*t*); but by modern statutes such promise or acknowledgment must be made or contained by or in some writing, to be signed by the party chargeable thereby, or by his agent (*u*). And in like manner a debt incurred or contract made by a person during infancy and voidable on that account, may be confirmed by an express promise or ratification made when of full age (*x*); although such a promise or ratification must now, by one of the statutes just mentioned (*y*), be made by some writing signed by the party to be charged therewith.

Debt barred by the Statute of Limitations.

Debt incurred during infancy.

By the ancient common law, every legal instrument in writing was a deed sealed and delivered (*z*); and, in accordance with this circumstance, contracts are, as we have seen (*a*), now divided in law into two kinds only, namely, parol (that is verbal) or *simple* contracts, and *special* contracts made by deed. But as the art of

(*s*) Stat. 21 Jac. I. c. 16, s. 3.

(*t*) Bac. Abr. tit. Limitations of Actions (E); *Prance* v. *Sympson*, Kay, 678; *Sidwell* v. *Mason*, 2 H. & N. 306, 310; *Holmes* v. *Mackrell*, 3 C. B., N. S. 789; *Cornforth* v. *Smithard*, 5 H. & M. 13; *Franeis* v. *Hawkesley*, 1 E. & E. 1052.

(*u*) Stat. 9 Geo. IV. c. 14, s. 1, called Lord Tenterden's Act; 19 & 20 Vict. c. 97, s. 13.

(*x*) Bac. Abr. tit. Infancy and Age (I) 8; *Williams* v. *Moor*, 11 Mee. & Wels. 256, 263; *Harris* v. *Wall*, 1 Ex. Rep. 122.

(*y*) Stat. 9 Geo. IV. c. 14, s. 5.

(*z*) See Principles of the Law of Real Property, 118, 2nd ed.; 123, 3rd & 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 144, 8th & 9th eds.; 145, 10th ed.

(*a*) *Ante*, p. 77.

writing became general, many parol contracts were, for greater certainty put into writing, though not made by deed. And by some statutes of modern times, writing is required to most simple contracts respecting matters of importance. These statutes we shall now proceed to notice, premising that, in all cases where writing is by any statute made necessary to a contract, the contract is still a *parol* one, though evidenced by the writing (*b*); but when a contract is made by deed, the *deed itself* is the contract (*c*). The first and most important statute then, by which writing is required to many agreements, is the Statute of Frauds (*d*), which enacts in its fourth section that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This enactment, it will be observed, does not give to writing any validity which it did not possess before. A written promise made since this statute, without any consideration, is quite as much *nudum pactum* as it would have been before (*e*). The statute merely adds

Contracts which are required to be in writing.

Statute of Frauds, s. 4.

(*b*) Sugd. Vend. and Pur. 115, 13th ed.

(*c*) Dyer, 305 a; *Byron* v. *Byron*, Cro. Eliz. 472; 1 Wms. Saund. 274 a, n. (3).

(*d*) 29 Car. II. c. 3.

(*e*) See Williams on Executors, pt. 4, bk. 2, ch. 2, sect. 2; 1 Wms. Saund. 211, n. (2).

a further requisite to the validity of certain contracts, namely, that they shall, besides being good in other respects, be put into writing, otherwise no action shall be maintained upon them (*f*).

Wain v. *Warlters.*

A great number of cases have been decided upon the above section of this celebrated statute. One of the most important is that of *Wain* v. *Warlters* (*g*), in which it was held that the statute, in requiring the *agreement* to be in writing, required that the *consideration*, which is part of the agreement, should be in writing, as well as the promise itself. And therefore a promise in writing to pay the debt of a third person, which did not state any consideration, was held to give no cause of action; and parol evidence of a consideration was not allowed to be given. This case was followed by many other decisions to the same effect (*h*). But a recent statute now provides that no special promise to answer for the debt, default or miscarriage of another person, being in writing and duly signed, shall be invalid to support an action, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document (*i*). The

Consideration need not now appear.

(*f*) Agreements, where the matter thereof is of the value of 5*l.*, or upwards, are, with some exceptions, liable to a stamp duty of 6*d.*, which may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed, by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, so that the stamp may be effectually cancelled, and rendered incapable of being used for any other instrument. Stat. 33 & 34 Vict. c. 97, Schedule, tit. Agreement, and see sects. 24 & 36.

(*g*) 5 East, 10; 2 Smith's Leading Cases, 147.

(*h*) *Saunders* v. *Wakefield*, 4 Barn. & Ald. 595; *Morley* v. *Boothby*, 3 Bing. 107; *Clancy* v. *Piggott*, 2 Adol. & Ell. 473; 1 Smith's Leading Cases, 136; 1 Wms. Saund. 211, n. (*d*); *Price* v. *Richardson*, 15 Mee. & Wels. 539.

(*i*) Stat. 19 & 20 Vict. c. 97, s. 3. See *Holmes* v. *Mitchell*, 7 C. B., N. S. 361; *Williams* v. *Lake*, 2 Ell. & Ell. 349.

phrase in the statute to *answer for* the debt, default or miscarriage of another person, means to answer for a debt, default or miscarriage *for which that other remains liable* (*k*). Thus where one party to an agreement verbally promised the other, that, in consideration of his discharging from custody a third person whom he had taken in execution for debt, he, the first party, would pay the debt, it was held that action might well be brought on this promise, although it was not put in writing (*l*). For this was not a promise to answer for the debt of another person, to which that other remained liable, but to pay a debt from which the other was discharged. It was an original promise to pay and not a collateral promise to guarantee, which is the meaning in the statute of the words "answer for." The words, "any agreement that is not to be performed within the space of one year from the making thereof," have been held to mean an agreement which appears from its terms incapable of performance within the year. Thus where one man promised another, for one guinea, to give him a certain number on the day of his marriage, it was held that a writing was unnecessary, for the marriage might have happened within the year (*m*). So a contract by A. that his executor shall pay 10,000*l.* need not be in writing (*n*); for the death of A. and payment of the money may all take place within a twelvemonth. It has also been held that, in order to bring an agreement within this clause of the statute, so as to render writing necessary, both parts of

Answering for debt, default or miscarriage.

Original Promise

Space of one year from the making.

(*k*) 1 Wms. Saund. 211 b, n. (2); 1 Smith's Leading Cases, 134; *Green* v. *Cresswell*, 10 Ad. & Ell. 453; S. C. 2 Per. & Dav. 430; *Cripps* v. *Hartnell*, Ex. Ch. 11 W. R. 953; 10 Jur., N. S. 200.

(*l*) *Goodman* v. *Chase*, 1 Barn. & Ald. 297. See also *Lane* v. *Burghart*, 1 Q. B. 933.

(*m*) *Peter* v. *Compton*, Skin. 353; 1 Smith's Leading Cases, 142; *Souch* v. *Strawbridge*, 2 C. B. 808.

(*n*) *Wells* v. *Horton*, 4 Bing. 40; *Ridley* v. *Ridley*, 34 Beav. 478.

the agreement must be such as are not to be performed within a year from the making thereof. Thus where a landlord agreed to lay out 50*l.* in improvements, in consideration of the tenant undertaking to pay him 5*l.* a year during the remainder of his term (of which several years were unexpired), it was held that writing was unnecessary (*o*); for although the tenant's part of the agreement was not to be performed within a year, the landlord's part might reasonably have been so. These decisions have considerably narrowed the operation of the statute, and have left remaining much of the mischief, arising from reliance on memory only, which it was the intention of the statute to obviate, by requiring written evidence (*p*). The last clause of the enactment has however received a very liberal construction. The words are "signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." And it has been held that any insertion by the party of his name in any part of the agreement is a sufficient signing within the statute (*q*), provided the name be inserted in such a manner as to have the effect of authenticating the instrument (*r*); and it is not necessary that both parties should sign the agreement. The whole of the agreement must be contained in the writing, either expressly or by reference to some other document, but the writing is required by the statute to be signed only by the party to be charged (*s*). And as a "memorandum or note" of the agreement is allowed, a writing sufficient to satisfy the statute may often be made out from letters written

Signed by the party to be charged.

Memorandum or note.

(*o*) *Donellan* v. *Reid*, 3 Barn. & Adol. 899; *Cherry* v. *Heming*, 4 Ex. Rep. 631.

(*p*) See 1 Smith's Leading Cases, 144 *et seq.*

(*q*) *Ogilvie* v. *Foljambe*, 3 Meriv. 62.

(*r*) *Stokes* v. *Moor*, 1 Cox, 219; *Selby* v. *Selby*, 3 Meriv. 4, 6.

(*s*) *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735, 742. See Sugd. Vend. & Pur. c. 4, ss. 3, 4, p. 102 *et seq.*, 13th edit.

by the party (*t*), or from a written offer, accepted, without any variation (*u*), before the party offering has exercised his right of retracting (*x*); and when correspondence is carried on by means of the post, an offer is held to be accepted from the moment that a letter accepting the offer is put into the post, although it may never reach its destination (*y*).

Acceptance of offer by letter.

The seventeenth section of the Statute of Frauds, which relates to contracts for the sale of goods, wares and merchandize for the price of 10*l.* or upwards, has been already noticed (*z*), together with the clause in the statute of Geo. IV., next noticed, called Lord Tenterden's Act, by which this enactment has been extended and explained (*a*).

Sale of goods for 10*l.* or upwards.

The next statute which requires our notice is intituled "An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements," and is commonly called Lord Tenterden's Act (*b*). By this statute no acknowledgment or promise by words only can take any case of simple contract out of the operation of the Statute of Limitation (*c*), or deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby (*d*.) The effect of such a promise has

Lord Tenterden's Act.

Written acknowledgment required to take the case out of the Statute of Limitations.

(*t*) *Owen* v. *Thomas*, 3 My. & Keen, 353.

(*u*) *Holland* v. *Eyre*, 2 Sim. & Stu. 194; *Gibbons* v. *North-Eastern Metropolitan Asylum District*, 11 Beav. 1.

(*x*) *Routledge* v. *Grant*, 4 Bing. 653; S. C. 1 Moo. & P. 717; *Gilkes* v. *Leonino*, 4 C. B., N. S. 485; *Hebb's case*, M. R., Law Rep., 4 Eq. 9.

(*y*) *Dunlop* v. *Higgins*, 1 H. of L. Cas. 381; *Duncan* v. *Topham*, 8 C. B. 225.

(*z*) *Ante*, p. 39.

(*a*) Stat. 9 Geo. IV. c. 14, s. 7; *ante*, p. 40.

(*b*) Stat. 9 Geo. IV. c. 14.

(*c*) Stat. 21 Jac. I. c. 16, s. 3.

(*d*) See *Lechmere* v. *Fletcher*, 1 Cro. & Mee. 623; *Bird* v. *Gammon*, 3 Bing. N. C. 883; *Cheslyn* v. *Dalby*, 4 You. & Coll. 238.

already been referred to (*e*). The statute makes no mention of any signature by an agent; but by a recent statute the signature of an agent has been rendered sufficient (*f*). And no joint contractor is to lose the benefit of the Statute of Limitations by reason only of any written acknowledgment or promise made and signed by any other joint contractor; but nothing therein contained is to alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever (*g*). However, no indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the Statute of Limitations (*h*). And by a recent statute payment of any principal or interest by a co-contractor or co-debtor will not deprive a debtor of the benefit of the Statute of Limitations (*i*). Lord Tenterden's Act further enacts, as has been already mentioned (*k*), that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. And it is further enacted (*l*), that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance

Promise to pay debts contracted in infancy.

Representations of character, &c.

(*e*) *Ante*, p. 82.

(*f*) Stat. 19 & 20 Vict. c. 97, s. 13.

(*g*) Stat. 9 Geo. IV. c. 14, s. 1; *Whinman* v. *Kynman*, 1 Ex. Rep. 118; *Cleave* v. *Jones*, 6 Ex. Rep. 573; *Bamfield* v. *Tupper*, 7 Ex. Rep. 27; *Fordham* v. *Wallis*, 10 Hare, 217; *Nash* v. *Hodgson*, Kay, 650; *Edwards* v. *Janes*, 1 Kay & John. 534.

(*h*) Sect. 3.

(*i*) Stat. 19 & 20 Vict. c. 97; s. 14, not retrospective; *Jackson* v. *Woolley*, 8 E. & B. 784.

(*k*) Stat. 9 Geo. IV. c. 14, s. 5, *ante*, p. 82.

(*l*) Stat. 9 Geo. IV. c. 14, s. 6.

made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain *credit, money or goods upon,* unless such representation or assurance be made in writing signed by the party to be charged therewith. There appears to be some error in the word "*upon*" in this enactment, which, as it stands, is superfluous (*m*). And it has been doubted whether a representation made to a purchaser by the trustee of some property, that the property was encumbered to a less extent than was actually the case, was a representation concerning the *ability* of the vendor within the meaning of the statute (*n*). The better opinion seems to be, that such a representation is within the statute, and ought consequently to be obtained in writing.

Bills and notes.

In addition to those contracts which by statute are required to be in writing, there exists a peculiar class of contracts, which in their nature are expressed in writing, and for which a consideration is presumed to have been given till the contrary is proved (*o*). These are bills of exchange and promissory notes (*p*). A bill of exchange is a written order from one person to another to pay to a third person, or to his order, or to the bearer, a certain sum of money. The person making the order is called the drawer, the person on whom it is made the drawee, and the person to whom the money is payable the payee. The bill is sometimes made payable to the drawer himself, or to his order, or to him or bearer. If the person on whom the bill is drawn undertakes to pay it, he writes on it the word "accepted," with his signature,

A bill of exchange.

(*m*) See 1 Mee. & Wels. 104, 123.

(*n*) See *Lyde* v. *Barnard*, 1 Mee. & Wels. 101; *Swann* v. *Phillips*, 8 Ad. & Ell. 457; *Devaux* v. *Steinkeller*, 6 Bing. N. C. 84.

(*o*) See *Mills* v. *Barber*, 1 Mee. & Wels. 425.

(*p*) See Byles on Bills, and Bayley on Bills.

A promissory note.

and is then called the acceptor. A promissory note, or note of hand, as it is sometimes called, is a written promise from one person to pay to another, or to his order, or to bearer, a certain sum of money. The person making the promise is called the maker of the note.

Prohibited bills and notes.

No negotiable or transferable bill or note can be lawfully drawn or made for any sum under 20*s.* (*q*); but any person may now draw upon his banker, who shall bonâ fide hold money for his use, any draft or order for the payment to the bearer, or to order, on demand, of any sum of money less than 20*s.* (*r*). Bills and notes under 5*l.* cannot be made payable to bearer on demand, and were formerly subject to other stringent restrictions (*s*), which were repealed for three years from the 28th of July, 1863, and until the end of the then next session of Parliament (*t*); and the repeal has been since regularly extended from year to year (*u*). Bills and notes payable to bearer on demand are also prohibited from being issued by bankers, except by the banks and under the restrictions mentioned in the act passed to regulate the issue of bank notes (*x*). Bills or notes payable to A. B. or order are transferable by a written order indorsed thereon by A. B. The mere signature by A. B. of his name on the back, followed by the delivery of the bill or note (*y*), is however sufficient for this purpose. This is called an indorsement in blank; and after such an indorsement, the bill or note, together with the right to sue upon it, may be transferred by mere delivery (*z*). Any holder of the bill may, consequently, after such an indorsement, enforce payment to

Indorsement in blank.

(*q*) Stat. 48 Geo. III. c. 88, s. 2.

(*r*) Stat. 23 & 24 Vict. c. 111, s. 19.

(*s*) Stat. 17 Geo. III. c. 30; 7 Geo. IV. c. 6, s. 4.

(*t*) Stat. 26 & 27 Vict. c. 105.

(*u*) Last extended by stat. 35 & 36 Vict. c. 88.

(*x*) Stat. 7 & 8 Vict. c. 32, ss. 10, 11.

(*y*) *Bromage* v. *Lloyd*, 1 Ex. Rep. 32.

(*z*) *Peacock* v. *Rhodes*, 2 Doug. 333.

himself. The indorsement may, however, be special, as "Pay C. D. or order, A. B." And in this case the bill or note, in order to become transferable, must be indorsed by C. D. But if a bill be once indorsed in blank, it will always be payable to the bearer by any of the parties thereto, although it may subsequently be specially indorsed; but the special indorser will not be liable to the bearer without the indorsement of the person to whom he has specially indorsed it (*a*). With regard to bankers, an act of the present reign provides that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof (*b*). A bill or note payable to bearer is transferable by mere delivery without any indorsement.

Special indorsement.

Banker's protection.

The effect of accepting a bill, or making a promissory note, is to render the acceptor or maker primarily liable to pay the same to the person entitled to require payment. The effect of drawing a bill is to make the drawer liable to payment, if the acceptor make default. But in order to charge the drawer of a foreign bill, it must, by the custom of merchants, be protested by a notary public (*c*). This protest is a declaration by him in due form that payment has been demanded and refused. A protest, however, is unnecessary for an inland bill or promissory note (*d*). The effect of indorsing a bill or note is to make the indorser also liable to payment, if the acceptor of the bill or maker of the note

Liability of acceptor;

of drawer.

Protest.

Liability of indorser.

(*a*) *Smith* v. *Clarke*, 1 Peake, 295; *Walter* v. *Macdonald*, 2 Ex. Rep. 527.

(*b*) Stat. 16 & 17 Vict. c. 59, s. 19.

(*c*) *Gale* v. *Walsh*, 5 T. Rep. 239.

(*d*) *Windle* v. *Andrews*, 2 Barn. & Ald. 696.

should make default. The indorsement operates as against the indorser as a new drawing of the bill by him (*e*). An indorsement, however, may be made without recourse to the indorser, or "sans recours," as it is generally expressed, in which case the indorser avoids all personal liability (*f*). The drawer of a bill, or the indorser of a bill or note, will, however, be discharged from all liability, unless the person requiring payment should, within a reasonable time, give him notice that the bill or note has not been paid, or, as it is termed, has been dishonoured, and give him to understand, either expressly or by implication, that he looks to him for payment (*g*). In consequence of a consideration being presumed to have been given for every bill or note till the contrary is shown, it follows, that if a bill or note should have been drawn, accepted or indorsed without any consideration, or for a consideration which is illegal, a bonâ fide holder for valuable consideration, or any indorsee from him, may, nevertheless, enforce payment; for when he took the security he was entitled to rely on the legal presumption of a proper consideration having been given (*h*). It is stated by Sir William Blackstone (*i*), "that every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration." This however appears to be a mistake. The law does not give this effect to bills of exchange and promissory notes in respect of the undertaking being evidenced by writing, but in order to strengthen and facilitate that commercial intercourse which is carried on through the medium of such securities (*k*). On this ground the law allows these in-

Bonâ fide holder may enforce payment.

Reason why a consideration is presumed.

(*e*) *Penny* v. *Innes*, 1 Cro. Mee. & Rosc. 441.

(*f*) Byles on Bills, 117, 6th ed.

(*g*) *Hartley* v. *Case*, 4 Barn. & Cress. 339; Byles on Bills, 213 *et seq.*, 6th ed.

(*h*) *Collins* v. *Martin*, 1 Bos. & Pull. 651; *Morris* v. *Lee*, Bayley on Bills, 500; *Robinson* v. *Reynolds*, 2 Q. B. 196; *May* v. *Chapman*, 16 M. & W. 355.

(*i*) 2 Black. Comm. 446.

(*k*) 1 Fonbl. Eq. 343, 344.

struments to form an exception to the general rule that a consideration must be shown for every agreement, although evidenced by writing. The remedies on bills of exchange and promissory notes have been facilitated by a recent act (*l*). Three days, called days of grace, beyond the time fixed for payment are allowed on every bill and note, except such as are payable on demand. Bills and notes payable at sight or on presentation are by the Bills of Exchange Act, 1871 (*m*), now deemed for all purposes whatsoever to be payable on demand (*n*).

Days of grace.

We now come to the second class of contracts, namely, special contracts, or contracts by deed. These contracts differ from mere simple contracts in the following important particular, that they of themselves import a consideration (*o*), whilst in simple contracts a consideration must be proved. For the law presumes that no man

Contracts by deed.

(*l*) Stat. 18 & 19 Vict. c. 67. (*m*) Stat. 34 & 35 Vict. c. 74.

(*n*) The stamps on bills and notes are now regulated by stat. 33 & 34 Vict. c. 97, schedule, tit. Bill of Exchange, and are, with some exceptions, as follows :—

	£	s.	d.
Bill of exchange payable on demand	0	0	1
Bill of exchange of any other kind whatsoever (except a bank note) and promissory note of any kind whatsoever (except a bank note), drawn or expressed to be payable, or actually paid, or endorsed, or in any manner negociated in the United Kingdom: where the amount or value of the money for which the bill or note is drawn or made does not exceed £5..	0	0	1
Exceeds £5 and does not exceed £10	0	0	2
„ 10 „ 25	0	0	3
„ 25 „ 50	0	0	6
„ 50 „ 75	0	0	9
„ 75 „ 100	0	1	0
„ 100— for every £100, and also for any fractional part of £100, of such amount or value	0	1	0

(*o*) 1 Fonbl. Eq. 342.

will put his seal to a deed without some good motive (*p*). And when an agreement is once embodied in a deed, such deed becomes itself the agreement, and not evidence merely, as is the case when a parol agreement is reduced to writing. On this principle it appears to be that, after a deed has been executed, any alteration, rasure or addition made in a material point, even by a stranger, will render the deed void (*q*). It is true that by recent decisions (*r*) this doctrine has been extended to a mere written agreement. But although it is no doubt highly important that all legal instruments should be preserved in their integrity, it may perhaps be doubted whether the doctrine in question would ever have existed, had there been no other reason for it than the duty of a person, having the custody of an instrument made for his benefit, to preserve it in its original state.

Alteration, rasure, &c.

Having now spoken of the promise, whether express or implied, which is necessary to a contract, and also of the consideration, whether express or implied, by which such promise is sustained, let us consider some important *objects* for which a contract may be made, and which seem to require a special mention. The object for which a contract is made may be either lawful or unlawful; and if it be unlawful the contract will be void, and the illegality may be pleaded as a defence to an action brought upon such a contract (*s*). A dis-

Objects of a contract, lawful or unlawful.

(*p*) See Principles of the Law of Real Property, 118, 2nd ed.; 123, 3rd & 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 143, 8th & 9th eds.; 144, 10th ed.

(*q*) *Pigot's ease*, 11 Rep. 27 a.

(*r*) *Davidson* v. *Cooper*, 13 Mee. & Wels. 343, 352; *Mollett* v. *Waekerbarth*, 5 C. B. 181. It is now held that immaterial alterations, though made by a party to an instrument, do not render it void; *Aldous* v. *Cornwell*, L. R., 3 Q. B. 573; *Adsetts* v. *Hives*, 33 Beav. 55.

(*s*) *Collins* v. *Blantern*, 2 Wils. 341, 347; S. C. 1 Smith's Leading Cases, 154; *Paxton* v. *Popham*, 9 East, 408; *Pole* v. *Harrobin*, 9 East, 416, n.; *De Begnis* v. *Armistead*, 10 Bing. 107; S. C. 3 Moo. & Scott, 516.

tinction was formerly taken between contracts whose object was merely prohibited by the law under some given penalty, and those whose object was morally wrong. The former were termed *mala prohibita*, the latter *mala in se* (*t*); and it was considered that, as the former involved no moral turpitude, a man might embrace either of the alternatives offered by the law, and either abstain from the offence and remain harmless, or commit it and suffer the penalty. This distinction, however, has long been exploded (*u*); for it is considered to be equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the state. Whether, therefore, the object of a contract be unlawful because morally wrong, or unlawful by the policy of the common law, or unlawful because a penalty is attached to it by any particular statute, in every case the contract is void; and it is indifferent, under such circumstances, whether the contract be made by deed, or by parol merely. Thus if a bond under seal be given by a man to a woman in order to induce her to cohabit with him, it is void for the immorality of its object (*x*). But a bond given to a woman in respect of the injury she has sustained by past cohabitation is valid (*y*). For in this case the object is not immoral; and the consideration implied by the bond being a deed under seal supplies the want

Mala prohibita and mala in se.

Distinction now exploded.

Contract with unlawful object void.

Bond to induce cohabitation void.

But bond for past cohabitation good.

(*t*) See 1 Black. Com. 54, 57.

(*u*) *Aubert* v. *Maze*, 2 Bos. & Pul. 374, 375; *Cannan* v. *Bryce*, 3 B. & Ald. 183; *Bensley* v. *Bignold*, 5 Barn. & Ald. 335, 341; *Cope* v. *Rowlands*, 2 Mee. & Wels. 149, 157; *Fergusson* v. *Norman*, 5 Bing. N. C. 76, 84.

(*x*) *Walker* v. *Perkins*, 1 Wm. Black. 517; S. C. 3 Burr. 1568; *Gray* v. *Mathias*, 5 Ves. 286.

(*y*) *Turner* v. *Vaughan*, 2 Wils. 339; *Hill* v. *Spencer*, 2 Amb. 641; *Gray* v. *Mathias*, 5 Ves. 286; *Hall* v. *Palmer*, 3 Hare, 532; *Kyne* v. *Moore*, 1 Sim. & Stu. 61; 2 Sim. & Stu. 260; *Inge* v. *Moseley*, 6 Barn. & Cres. 133; 2 Sim. 161.

which would otherwise exist of a proper consideration (*z*).

If some objects be lawful and others unlawful.

If a contract have more than one object, and some of the objects are lawful whilst the others are unlawful, the unlawful objects will not vitiate the others (*a*), provided the good part be separable from, and not dependent upon, that which is bad (*b*); unless of course the whole contract should be rendered void by any enactment to the effect that all instruments containing any matter contrary thereto shall be void, in which case everything connected with the instrument will be vitiated (*c*). And if the good part of a contract be inseparable from the bad, as if a contract be made partly in consideration of the payment of money (which would be good), and partly for a consideration whose object is illegal, the illegal part of the consideration will vitiate the good, and render the whole contract void (*d*).

Immoral publication.

The instance above given of a bond for future cohabitation is an example of a contract void on account of its object being *malum in se*, or morally wrong. In the same manner, no action can be maintained on any contract for the sale or publication of any libellous or immoral book or print (*e*). A striking instance of a

(*z*) *Binnington* v. *Wallis*, 4 Barn. & Ald. 650, 652; *ante*, p. 79.

(*a*) *Gaskell* v. *King*, 11 East, 165; *Wigg* v. *Shuttleworth*, 13 East, 87; *Howe* v. *Synge*, 15 East, 440; in all which decisions unlawful covenants to pay the property tax were held not to vitiate other valid covenants in the same instrument. See also *Kerrison* v. *Cole*, 8 East, 231; *Mallan* v. *May*, 11 Mee. & Wels. 653; *Green* v. *Price*, 13 Mee. & Wels. 695; affirmed 16 Mee. & Wels. 346; *Nicholls* v. *Stretton*, 10 Q. B. 346.

(*b*) See *Biddell* v. *Leeder*, 1 Barn. & Cress. 327, decided on the old Ship Registry Act.

(*c*) See 1 Smith's Leading Cases, 169, and the statutes recited in the preamble to 5 & 6 Will. IV. c. 41.

(*d*) *Fetherstone* v. *Hutchinson*, Cro. Eliz. 199; *Bridge* v. *Cage*, Cro. Jac. 103. See also per Tindal, C. J., in *Waite* v. *Jones*, 1 Bing. N. C. 662; *Hopkins* v. *Prescott*, 4 C. B. 578.

(*e*) *Fores* v. *Johnes*, 4 Esp. 97; *Stockdale* v. *Onwhyn*, 5 Barn. & Cres. 173; S. C. 7 Dow. & Ry. 625; *Lawrence* v. *Smith*, Jac. 471.

Contracts in restraint of trade.

contract, void on account of its object being contrary to the policy of the common law, occurs in the case of a contract in restraint of trade. It is for the advantage of the community that every person should be allowed the full exercise of his trade or profession; and any contract whereby a person is attempted to be restrained from following his usual calling, even for a limited time, is therefore absolutely void (*f*). But a contract is not rendered void by having for its object the restraint of a person from trading in a particular place (*g*), or within a reasonable distance from any particular place (*h*), for he may carry on his trade elsewhere; nor is a contract void which restrains a person from serving a particular class of customers (*i*) (for there are plenty of others to be found), or which binds a person to be the servant for life in his trade to another (*k*), for this is not in restraint of trade when it is to be carried on for his life. In a recent case (*l*) a person agreed that he would become assistant to a dentist for four years, and that after the expiration of that term he would not carry on the business of a dentist in London, or any of the towns or places in England or Scotland where the dentist might

(*f*) Year Book, P. 2 Hen. V. pl. 26; *Ward* v. *Byrne*, 5 Mee. & Wels. 548; *Hind* v. *Gray*, 1 Man. & Gran. 195.

(*g*) *Hitchcock* v. *Coker*, 6 Ad. & El. 438; S. C. 1 Nev. & P. 796; *Archer* v. *Marsh*, 6 Ad. & Ell. 959; S. C. 2 Nev. & P. 562; *Leighton* v. *Wales*, 3 Mee. & Wels. 545.

(*h*) *Davis* v. *Mason*, 5 T. Rep. 118; *Proctor* v. *Sergeant*, 2 Man. & Gr. 20; S. C. 2 Scott, N. R. 289; *Whittaker* v. *Howe*, 3 Beav. 383; *Pemberton* v. *Vaughan*, 10 Q. B. 87; *Atkyns* v. *Kinnier*, 4 Ex. Rep. 776; *Elves* v. *Crofts*, 10 C. B. 241; *Avery* v. *Langford*, Kay, 663, 667, where the cases are collected; *Harms* v. *Parsons*, 32 Beav. 328; *Brampton* v. *Beddoes*, 13 C. B., N. S. 538. The distance is reckoned as measured on a map, *Mouflet* v. *Cole*, Ex. Ch. 21 W. R. 175; Law Rep., 8 Ex. 32.

(*i*) *Rannie* v. *Irvine*, 7 Man. & Gr. 969.

(*k*) *Wallis* v. *Day*, 2 Mee. & Wels. 273.

(*l*) *Mallan* v. *May*, 11 Mee. & Wels. 653. See also *Green* v. *Price*, 13 Mee. & Wels. 695, affirmed, 16 Mee. & Wels. 346; *Nicholls* v. *Stretton*, 10 Q. B. 346.

have been practising before the expiration of the service. And it was held that the covenant not to practise in London was valid; but that the stipulation as to the other towns and places in England or Scotland was void. And according to the rule above mentioned (*m*), that where some of the objects of a contract are lawful and others unlawful, the unlawful objects will not vitiate the others, it was held that the stipulation as to practising in London was not affected by the illegality of the remainder of the agreement. The rule that contracts in restraint of trade are void at law has recently been in some respects relaxed in favour of trades unions by the Trades Union Act, 1871 (*n*). Maintenance, or the unlawful maintaining of another person's suit (*o*), and champerty, which is the maintenance of a suit in consideration of a share in the property to be gained (*p*) are both unlawful at common law and by divers ancient statutes. And any contract which commits either of these offences is void (*q*).

The Trades Union Act, 1871.

Maintenance.

Champerty.

The cases in which contracts may be void in consequence of their contravening some acts of parliament are too numerous to be here specified. As an instance may be mentioned contracts by clergymen holding benefices with cure of souls, made for the purpose of charging such benefices with any sum of money; which contracts are rendered void by a statute of Elizabeth (*r*). And in these cases it has been held that any personal covenant for the payment of the money charged is not invalidated by being contained in the same deed as the

Charges on benefices.

(*m*) *Ante*, p. 96.

(*n*) Stat. 34 & 35 Vict. c. 31.

(*o*) Bac. Abr. tit. Maintenance.

(*p*) Bac. Abr. tit. Champerty.

(*q*) See *Hunter* v. *Daniel*, 4 Hare, 420, 431; *Sprye* v. *Porter*, 7 E. & B. 58; 26 L. J., Q. B. 64; *Hutley* v. *Hutley*, Law Rep., 8 Q. B. 112.

(*r*) Stat. 13 Eliz. c. 20. See *Shaw* v. *Pritchard*, 10 Barn. & Cress. 241; *Long* v. *Storie*, 3 De Gex & Smale, 308.

attempted charge on the benefice(*s*). Contracts for the sale or transfer of stock, of which the person contracting was not possessed at the time, and of which no transfer was intended to be made, were formerly void by the Stock Jobbing Act(*t*); and money lent for the purpose of settling losses which had arisen from such illegal contracts could not be recovered back(*u*). But this act is now repealed(*x*). Securities for money won at play or any game, or by betting on any game, or for money lent for gaming or betting at the time and place of such play, were declared by a statute of Anne to be utterly void(*y*); but by a later statute(*z*) such securities are not to be utterly void, but are to be taken to have been given for an illegal consideration; they are consequently now void only as between the parties, but valid in the hands of any innocent holder, to whom they may have been transferred without notice of the illegality of the transaction in which they originated(*a*). And by a more recent statute(*b*) it is enacted, that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. But this enactment is not to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize or sum of money to be awarded to the winner or

Stock Jobbing Act.

Securities for money won at play.

Contracts by way of gaming void.

(*s*) *Monys* v. *Leake*, 8 T. Rep. 411; *Sloane* v. *Puckman*, 11 Mec. & Wels. 770.

(*t*) Stat. 7 Geo. II. c. 8, s. 8. See *post*, the chapter on Stock.

(*u*) *Cannan* v. *Bryce*, 3 Barn. & Ald. 179.

(*x*) Stat. 23 Vict. c. 28.

(*y*) Stat. 9 Anne, c. 14.

(*z*) 5 & 6 Will. IV. c. 41; *Hawker* v. *Hallewell*, 3 Sma. & Giff. 194.

(*a*) See *ante*, p. 92.

(*b*) Stat. 8 & 9 Vict. c. 109, s. 18.

winners of any lawful game, sport, pastime or exercise.

Usurious contracts.

Contracts for the payment of money, whereby there should be reserved more than five per cent. interest, were in like manner declared void by a statute of Anne, called the Usury Law (*c*); but in order to protect innocent holders of securities given for usurious consideration, it was subsequently declared that such contracts should not be absolutely void, but should be considered to have been made for an illegal consideration (*d*). However, by a statute of the reign of King William the Fourth (*e*), it was provided that no bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, should be void by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negociating or transferring the same. And by a subsequent statute (*f*), all bills of exchange and promissory notes made payable at or within twelve months after the date thereof, or not having more than twelve months to run, and all contracts for the loan or forbearance of money above the sum of 10*l.* sterling, were exempted from the operation of the Usury Law. Nothing, however, contained in the last-mentioned act was to extend to the loan or forbearance of any money upon security of any lands, tenements or hereditaments, or any estate or interest therein. And now, by an act passed on the 10th of August, 1854 (*g*), all the laws against usury are repealed. But where interest is now payable upon any contract, express or implied, for payment of the legal or current rate of interest, or where interest is payable by any rule of law, the same rate is recoverable as before the act (*h*).

Usury laws now repealed.

(*c*) Stat. 12 Anne, st. 2, ch. 16.
(*d*) Stat. 5 & 6 Will. IV. c. 41.
(*e*) Stat. 3 & 4 Will. IV. c. 98, s. 7.
(*f*) 2 & 3 Vict. c. 37.
(*g*) Stat. 17 & 18 Vict. c. 90.
(*h*) Sect. 3.

Contracts by attornies and solicitors.

It was formerly unlawful for any attorney or solicitor to make a bargain, with his client in any action or suit, for any other costs than those to be allowed on taxation of his bill by the proper officer of the Court (*i*). But a beneficial change has been made in this respect by the Attornies and Solicitors Act, 1870 (*j*). Under this Act (*k*) an attorney or solicitor may now make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor, or as an advocate or conveyancer, either by a gross sum, or by commission or per centage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated. But such agreements are subject to many provisions and conditions contained in the act (*l*), and intended to be for the security of the client; and nothing in the act contained is to be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interest, of his client in any suit, action or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action stipulates for payment only in the event of success in such suit, action or proceeding (*m*).

The Attornies and Solicitors Act, 1870.

The above enactments are perhaps the most important statutory provisions by which contracts may be vitiated. Contracts whose objects are lawful are endlessly diversified, and many of them are regulated by laws which it is not within the scope of the present work to enumerate.

Contracts with lawful objects.

(*i*) *Earle* v. *Hopwood*, 9 C. B., N. S. 566.
(*j*) Stat. 33 & 34 Vict. c. 28.
(*k*) Sect. 4.
(*l*) Sects. 4—15.
(*m*) Sect. 11.

For the breach of any such contract pecuniary damages are, as we have seen (*n*), the sovereign remedy prescribed by law; though equity not unfrequently administers more appropriate specifics. The person to whom money has become due, whether from any injury received, or from any contract broken, or from a contract to pay money itself, stands in a situation more or less advantageous as regards his remedies for recovering the money, according to the nature of the *debt* which has thus become due to him. For by the law of England all creditors are not allowed equal rights, but are preferred the one to the other, partly according to accidental circumstances, and partly according to the degree of diligence and precaution which each may have used. The subject of debt is of sufficient importance to form a separate chapter.

Debts.

(*n*) *Ante*, p. 68.

CHAPTER III.

OF DEBTS.

DEBTS, by the law of England, are divided into different classes, conferring on the creditor different degrees of security for re-payment. The class which confers the highest privileges is that of debts of record, which class will accordingly first claim our attention.

Debt of record.

A debt of record is a debt due by the evidence of a court of record (*a*). Every court, by having power given to it to fine and imprison, is thereby made a court of record (*b*). Such courts are either supreme, superior or inferior. The supreme court is the Parliament. The superior courts of record are the House of Lords, the Court of Chancery, and the Courts of Queen's Bench, Common Pleas and Exchequer, which are the more principal courts. The courts of the Counties Palatine of Lancaster and Durham are also superior courts of record (*c*). The London Court of Bankruptcy is also a principal court of record (*d*). The Court of Probate is also a court of record (*e*); and so is the High Court of Admiralty (*f*). The inferior courts of record may be said, generally, to consist of the numerous courts established throughout the country, under the acts for the more easy recovery of small debts and demands in England, now called the County Courts Acts (*g*).

Superior courts of record.

Inferior courts of record.

County courts.

(*a*) 2 Black. Com. 465.
(*b*) Bac. Abr. tit. Courts (D) 2.
(*c*) *Ibid.* (D) 1.
(*d*) Stat. 32 & 33 Vict. c. 71, s. 65.
(*e*) Stat. 20 & 21 Vict. c. 77, s. 23.
(*f*) Stat. 24 Vict. c. 10, s. 14.
(*g*) Stats. 9 & 10 Vict. c. 95, s. 3; 12 & 13 Vict. c. 101; 13 & 14

Crown debts.

Debts of record do not, however, confer the same advantages on all creditors equally, for there is one creditor whose claims are paramount to all others, namely, the crown. In order to enjoy this priority, the crown debt was formerly required to be a debt of record, or a debt by specialty, that is, secured by deed (*h*); though if the debt were by simple contract without such security, it would have had preference over the other simple contract creditors of the debtor, and, as some say, even over other creditors by specialty (*i*). But the distinction which formerly existed between specialty and simple contract debts has been abolished by a recent statute (*k*), which reduces all specialty debts to the level of debts by simple contract. It seems, therefore, that a simple contract debt to the crown would now prevail over a specialty debt due to a private person. The lien of the crown on the lands of its debtors by record or specialty, and also on the lands of accountants to the crown, is mentioned in the author's Treatise on the Principles of the Law of Real Property (*l*).

Judgment debt.

Of all debts which one subject may owe to another, that which confers the most important remedy is a *judgment debt*, or a debt which is due by the *judgment* of a court of record. As such a debt is due by the evidence of a court of record, it is of course a debt of record. Such a debt may however now be incurred without any actual exercise of judgment on the part of the court. For, strange as it may appear, a judgment against a

Vict. c. 61; 15 & 16 Vict. c. 54; 17 & 18 Vict. c. 16; 19 & 20 Vict. c. 108; 21 & 22 Vict. c. 74; 22 & 23 Vict. c. 57; 28 & 29 Vict. c. 99; 29 & 30 Vict. c. 14; 30 & 31 Vict. c. 142; 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.

(*h*) Williams on Executors, pt. 3, bk. 2, ch. 2, s. 1.

(*i*) Bac. Abr. tit. Executors (L) 2.

(*k*) Stat. 32 & 33 Vict. c. 46.

(*l*) Page 62, 1st ed.; 65, 2nd ed.; 70, 3rd & 4th eds.; 76, 5th ed.; 81, 6th ed.; 84, 7th ed.; 85, 8th ed.; 87, 9th ed.; 89, 10th ed.

defendant in an adverse suit, though the most obvious, is yet not the most usual method of incurring a judgment debt. Such a debt may be incurred by the voluntary default of the defendant in making no reply to the action, which is called *nihil dicit*, or by his failing to instruct his attorney, whose statement of that circumstance is called *non sum informatus*, or by a *cognovit actionem*, or more shortly *cognovit*, by which the defendant confesses the action, and suffers judgment to be at once entered up against him (*m*). Of late years also it has become very usual for the parties to a suit to obtain by consent a judge's order, authorizing the plaintiff to enter up judgment against the defendant, or to issue execution against him, either at once and unconditionally, or more usually at a future time, conditionally on the non-payment of whatever amount may be agreed on. A judgment obtained on a judge's order for immediate judgment and execution is however the same thing as a judgment by *nihil dicit*, or confession (*n*). The method formerly the most frequent of incurring a judgment debt is not however attended with the actual commencement of any adverse action. A *warrant of attorney* is given by the intended debtor, which consists of an authority from him to certain attorneys to appear for him in court, and to receive a declaration in an action of debt for the amount of the intended judgment debt, at the suit of the intended creditor, and thereupon to confess the action, or suffer judgment to go by default, and to permit judgment to be forthwith entered up against the intended debtor for the amount, besides costs of suit. Such a warrant of attorney is generally executed as a security for a smaller sum of money, usually one-half of the amount of the judgment debt; and it is accordingly accompanied by a *defeazance*, which must be written on

Cognovit.

Judge's order.

Warrant of attorney.

Defeazance.

(*m*) 3 Black. Com. 397; Stephen on Pleading, 120.

(*n*) *Bell* v. *Bidgood*, 8 C. B. 763; *Andrews* v. *Diggs*, 4 Ex. Rep. 827.

the same paper or parchment as the warrant of attorney, otherwise the warrant will be void (*o*). This defeazance, as its name imports, defeats the full operation of the warrant of attorney, by declaring that it is given only as a security for the smaller sum and interest, and that no execution shall issue on the judgment to be entered up in pursuance of the warrant of attorney, until default shall have been made in payment of such sum and interest at the time agreed on; but that, in case of default, execution may be issued (*p*). The defeazance also until recently contained an agreement that it should not be necessary for the creditor to issue a writ of *scire facias*, or do any other act for reviving the judgment or keeping the same on foot, although no proceedings should have been taken thereupon for the space of one year. Without such a provision, no execution could be issued after the expiration of a twelvemonth from the date of the judgment, without the expense and trouble of a writ of *scire facias*, calling on the debtor to inform the court, or show cause, why execution should not be issued (*q*). But the Common Law Procedure Act, 1852, now provides that during the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment (*r*). A warrant of attorney is also sometimes given for entering up judgment for a

Scire facias.

Warrant of attorney to secure an annuity.

(*o*) Reg. Gen. Hil. 1853, s. 27; stat. 3 Geo. IV. c. 39, s. 4; 32 & 33 Vict. c. 62, s. 26. Collateral securities must be noticed; *Morell* v. *Dubost*, 3 Taunt. 235.

(*p*) Warrants of attorney to confess judgment for securing any sum or sums of money are, with some exceptions, liable to the same duty (one-eighth per cent. on the money secured) as mortgages for the like purpose. Stat. 33 & 34 Vict. c. 97. See Principles of the Law of Real Property, 404, 9th ed.; 407, 10th ed.

(*q*) Stat. Westm. the second, 13 Edw. I. c. 45.

(*r*) Stat. 15 & 16 Vict. c. 76, s. 128.

sum of money, in order to secure the regular payment of an annuity; in which case the defeazance of course expresses that no execution shall be issued until default shall have been made for so many days in some payment of the annuity, but that, in case of such default, execution may be issued from time to time (*s*).

Execution and attestation of warrants of attorney and cognovit.

A warrant of attorney need not be under seal (*t*), though it generally is so. In order to guard against any imposition in procuring debtors to execute warrants of attorney or *cognovits* in ignorance of the effect of such instruments, it is provided (*u*) that a warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall not be of any force, unless there is present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney. And a warrant of attorney or cognovit not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same (*x*). Every acknowledgment of satisfaction of a judgment is also required to be attested in a similar manner (*y*). Since

(*s*) See *Cuthbert* v. *Dobbin*, 1 C. B. 278.

(*t*) *Kinnersley* v. *Mussen*, 5 Taunt. 264.

(*u*) Stat. 32 & 33 Vict. c. 62, s. 24, re-enacting stat. 1 & 2 Vict. c. 110, s. 9, repealed by stat. 32 & 33 Vict. c. 83.

(*x*) Stat. 32 & 33 Vict. c. 62, s. 25, re-enacting stat. 1 & 2 Vict. c. 110, s. 10, repealed by stat. 32 & 33 Vict. c. 83; *Potter* v. *Nicholson*, 8 Mec. & Wels. 494; *Everard* v. *Poppleton*, 5 Q. B. 181; *Pocock* v. *Pickering*, 18 Q. B. 789.

(*y*) Reg. Gen. Hil. 1853, s. 80.

the acts for registering writs of execution (*z*), warrants of attorney have become much less frequent than before.

Not only was there a risk of debtors being imposed upon, in being prevailed on to execute warrants of attorney, but creditors also were formerly liable to be defrauded by their debtors giving secret warrants of attorney, cognovits, or judge's orders, to some favoured creditors, to the prejudice of the others. In order to obviate this inconvenience, provision has been made by modern acts of parliament for the filing, in the office of the Court of Queen's Bench, of all warrants of attorney, with the defeazances thereto, and of all cognovits, and of all such judge's orders as before mentioned, or of copies thereof, within twenty-one days after their execution, otherwise the same shall be deemed fraudulent and shall be void (*a*). And a list of such warrants of attorney, cognovits and judge's orders (*b*), and also an index containing the names, additions and descriptions of the persons giving the same (*c*), is directed to be kept by the officer of the Queen's Bench, open to public inspection and search on payment of a small fee.

Provision for filing warrants of attorney, cognovits, and judge's orders within twenty-one days.

Every judgment debt carries interest at the rate of 4*l. per cent. per annum* from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment (*d*). On the death of the debtor, his judgment debts must be paid in full by his executors or

A judgment debt carries interest.

Judgment debts entitled to preference

(*z*) Stats. 23 & 24 Vict. c. 38; 27 & 28 Vict. c. 112. See Principles of the Law of Real Property, p. 79, 6th ed.; 81, 82, 7th ed.; 82, 83, 8th ed.; 86, 9th & 10th eds.

(*a*) Stats. 3 Geo. IV. c. 39, ss. 1, 3; 32 & 33 Vict. c. 62, ss. 26, 27, 28. The twenty-one days are reckoned exclusively of the day of execution; *Williams* v. *Burgess*, 12 Adol. & Ell. 635.

(*b*) Stat. 3 Geo. IV. c. 39, s. 5.

(*c*) Stats. 6 & 7 Vict. c. 66; 32 & 33 Vict. c. 62, s. 28.

(*d*) Stat. 1 & 2 Vict. c. 110, s. 17.

administrators out of his personal estate before any of his debts on bond or by simple contract (*e*); but it is now provided that, in order to secure this preference, the judgment must be registered or re-registered within five years before the death of the testator or intestate, in the same manner as is required in order to affect lands in the hands of purchasers or mortgagees (*f*). The decree of a court of equity is equivalent to the judgment of a court of law (*g*). And the privilege of priority of payment extends to the judgments of every court of record, whether superior or inferior; but the judgment of a foreign court is entitled to no precedence over a simple contract debt (*h*). The remedies of the creditor by judgment of any of the superior courts, against the real estate of his debtor, are mentioned in the author's treatise on the Principles of the Law of Real Property (*i*). The remedies against the choses in possession of the debtor have been referred to in a previous part of the present work (*k*). The remedies in respect of the choses in action of the debtor will be hereafter mentioned. In addition to these remedies, such a judgment creditor might formerly have imprisoned the person of his debtor by means of the writ of *capias ad satisfaciendum* (*l*); but should he have done so, he would have relinquished all right and title to the benefit of any charge or security which he might have obtained

in administration;

but must be registered.

Remedies of judgment creditors.

Imprisonment by writ of *capias ad satisfaciendum*.

(*e*) Wentworth's Executors, 265 *et seq.* 14th ed.; Williams on Executors, pt. iii. bk. 2, c. 2, s. 2; *Berrington* v. *Evans*, 3 Y. & Col. 384.

(*f*) Stat. 23 & 24 Vict. c. 38, ss. 3, 4, not retrospective; *Evans* v. *Williams*, 2 Drew. & Smale, 324. See *Re Rigby*, M. R., 12 W. R. 32; *Jennings* v. *Rigby*, 33 Beav. 198; Principles of the Law of Real Property, p. 75 *et seq.* 6th ed.; 80 *et seq.* 7th ed.; 81 *et seq.* 8th ed.; 84 *et seq.* 9th ed.; 85 *et seq.* 10th ed.

(*g*) *Shafto* v. *Powe*, 3 Lev. 355.

(*h*) *Duplex* v. *De Proven*, 2 Vern. 540. See also *Smith* v. *Nicolls*, 5 Bing. N. C. 208.

(*i*) P. 63 *et seq.* 2nd ed.; 66, 3rd & 4th eds.; 71, 5th ed.; 75, 6th ed.; 78, 7th & 8th eds.; 81, 9th & 10th eds.

(*k*) *Ante*, p. 53.

(*l*) Bac. Abr. tit. Execution (C) 3.

by virtue of his judgment (*m*). If, however, the debt should not have exceeded 20*l*., the debtor could not have been imprisoned (*n*) without a previous summons and examination before a commissioner of bankrupt or a judge of a county court, who would have ordered the commitment of the debtor only in case of fraud or other ill behaviour (*o*); and the imprisonment would not then have operated as any satisfaction of the debt (*p*). But an act has now been passed for the abolition of imprisonment for debt and for the punishment at the same time of fraudulent debtors (*q*). This act is styled "The Debtors Act, 1869," and the 1st of January, 1870, is the date of its commencement. It provides, that, with the exceptions after mentioned, no person shall, after the commencement of the act, be arrested or imprisoned for making default in payment of a sum of money. The exceptions are:—(1.) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract. (2.) Default in payment of any sum recoverable summarily before a justice or justices of the peace. (3.) Default by a trustee or person acting in a fiduciary capacity and ordered by a court of equity to pay any sum in his possession or under his control. (4.) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order. (5.) Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order. (6.) Default in payment

Abolition of imprisonment for debt.

The Debtors Act, 1869.

Exceptions.

(*m*) Bac. Abr. tit. Execution (D); stat. 1 & 2 Vict. c. 110, s. 16.

(*n*) Stat. 7 & 8 Vict. c. 96, s. 57.

(*o*) Stat. 8 & 9 Vict. c. 127; 9 & 10 Vict. c. 95, s. 99.

(*p*) Stat. 8 & 9 Vict. c. 127, s. 3; 9 & 10 Vict. c. 95, s. 103.

(*q*) Stat. 32 & 33 Vict. c. 62.

of sums in respect of the payment of which orders are in that act authorized to be made. But no person is to be imprisoned in any case excepted from the operation of that section for a longer period than one year (*r*). Power is also reserved for any court to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent court; but this power is guarded by many provisions which it is not here necessary to recite (*s*). Arrest on mesne process is also allowed under certain circumstances if the debtor is about to quit England (*t*). Provision is also made for the punishment of fraudulent debtors by imprisonment for any time not exceeding two years with or without hard labour (*u*). An act has recently been passed for rendering judgments obtained in the Superior Courts in England, Scotland and Ireland effectual in any other part of the United Kingdom (*v*).

Scotch and Irish judgments.

Judgments of the inferior courts may be removed into the superior courts by order of any judge of the latter courts; and immediately on such removal the judgment has the same force, charge and effect as a judgment of the superior court; but it cannot affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless registered in the same manner as judgments of the superior courts (*w*). A registry is now provided for judgments in the county courts for the sum of 10*l.* and upwards (*x*).

Removal of judgments of inferior courts.

Registry of judgments in county courts.

(*r*) Stat. 32 & 33 Vict. c. 62, s. 4.
(*s*) Sect. 5.
(*t*) Sect. 6.
(*u*) Sect. 11 *et seq.*
(*v*) Stat. 31 & 32 Vict. c. 54.
(*w*) Stat. 1 & 2 Vict. c. 110, s. 22; 18 & 19 Vict. c. 15, s. 7. See Principles of the Law of Real Property, 74, 5th ed.; 78, 6th ed.; 80, 7th ed.; 81, 8th ed.; 84, 9th ed.; 85, 10th ed.
(*x*) Stat. 15 & 16 Vict. c. 54, s. 18.

Recognizances and statutes.

In addition to judgment debts, other debts of record are *recognizances* when duly enrolled (*y*), and statutes merchant, statutes staple and recognizances in the nature of statutes staple. The three last are now quite obsolete. A recognizance is an obligation entered into before some court of record or magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace, or to pay a debt (*z*). It is payable out of the personal estate of the debtor, in the event of his decease, next after judgment debts (*a*).

Specialty debts.

Next in importance to debts of record are *specialty debts*, or debts secured by *special contract* contained in a *deed* (*b*). These are of two kinds, debts by specialty in which the heirs of the debtors are bound, and debts by specialty in which the heirs are not bound. On the decease of the debtor, both these classes of specialty debts have always stood on a level so far as regards their payment out of the personal estate of the debtor. They formerly ranked next after debts of record, and took precedence of all debts by simple contract (*c*), with the exception of money owing for arrears of rent, to which the feudal principles of our law have given an importance equal to that of debts secured by deed (*d*). Debts by specialty in which the heirs were bound had, however, a precedence over those in which the heirs were not bound, in case the real estate of the debtor should have been resorted to on his decease (*e*); unless

Arrears of rent.

Precedence of specialties binding the heir.

(*y*) *Glynn* v. *Thorpe*, 1 Barn. & Ald. 153.

(*z*) 2 Bla. Com. 341.

(*a*) Williams on Executors, pt. iii. bk. 2, c. 2, s. 2.

(*b*) 2 Bla. Com. 465. See *ante*, p. 77.

(*c*) *Pinchon's case*, 9 Rep. 88 b.

(*d*) Wentworth's Executors, 284, 14th ed.; *Claugh* v. *French*, 2 Coll. 277.

(*e*) See Principles of the Law of Real Property, 60, 2nd ed.; 63, 3rd & 4th eds.; 68, 5th ed.; 72, 6th ed.; 77, 7th ed.; 78, 8th, 9th & 10th eds.; *Richardson* v. *Jenkins*, 1 Drew. 477, 483.

he should have charged his real estates by his will with the payment of his debts, in which case all the creditors of every kind would have been paid out of the produce of such real estates, without any preference (*f*). An act, however, has recently passed to abolish the distinction as to priority of payment which formerly existed between the specialty and simple contract debts of deceased persons (*g*). This act provides that in the administration of the estate of every person who shall die on or after the 1st of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding; provided that the act shall not prejudice or affect any lien, charge or other security which any creditor may hold or be entitled to for the payment of his debt.

Priority of specialty debts now abolished.

For the sake of the advantage of priority which might have been gained on the decease of the debtor, his heirs were usually bound in every specialty debt; and the old form still continues in use. The deed creating the debt may be either a deed of *covenant* or a *bond*. A covenant runs thus: "And the said (*debtor*) doth hereby for himself, his *heirs*, executors and administrators, covenant with the said (*creditor*), his executors and administrators," to pay, &c. A bond is in the following form: "Know all men by these

Covenant.

Bond.

(*f*) 2 Jarm. Wills, 523, 2nd ed.; 584, 3rd ed.

(*g*) Stat. 32 & 33 Vict. c. 46. The public are indebted for this important act to Mr. J. Hinde Palmer, Q.C.

presents, that I (*debtor*), of (*such a place*), am held and firmly bound to (*creditor*), of (*such a place*), in the penal sum of 1,000*l.* of lawful money of Great Britain, to be paid to the said (*creditor*), or to his certain attorney, executors, administrators or assigns, for which payment to be well and truly made I bind myself, my *heirs*, executors and administrators, and every of them, firmly by these presents. Sealed with my seal. Dated this 1st day of January, 1848." In both of the above cases it will be observed that the executors and administrators are bound as well as the heirs. This, however, is not absolutely necessary, and the covenant or bond would formerly have been equally effectual if the heirs only had been named in it(*h*), and would now be equally effectual without naming either heirs, executors or administrators.

Single bond.

A bond in the form above mentioned, without any addition to it, is called a single bond. Bonds, however, have usually a condition annexed to them, that, on the person bound (called the obligor) doing some specified act (as paying money when the bond is to secure the payment of money), the bond shall be void. The condition of an ordinary money-bond is as follows: "The condition of the above-written bond or obligation is such, that if the above-bounden (*debtor*), his heirs, executors or administrators, should pay unto the said (*creditor*), his executors, administrators or assigns, the full sum of 500*l.* (*usually half the amount named in the penalty*) of lawful money of Great Britain, with interest for the same after the rate of 5*l. per cent. per annum*, upon the —— day of —— now next ensuing, without any deduction or abatement whatsoever, then the above-written bond or obligation shall be void, otherwise the same shall remain in full force." Bonds with con-

Bond with condition.

(*h*) Co. Litt. 209 a; *Barber* v. *Fox*, 2 Wms. Saund. 136.

ditions of this kind have been long in use. In former times, when the condition was forfeited, the whole penalty was recoverable (*i*). Equity subsequently interfered, and prevented the creditor from enforcing more than the amount of the damage which he had actually sustained. The courts of law at length began to follow the example of the courts of equity; and according to a course of proceeding, of which there are many examples in the history of our law, the legislature more tardily adopted the rules which had already been acted on in the courts; and by a statute of the reign of Queen Anne it was provided, that, in case of a bond with a condition to be void upon payment of a lesser sum, at a day or place certain, the payment of the lesser sum with interest and costs shall be taken in full satisfaction of the bond, though such payment be not strictly in accordance with the condition (*j*). But if the arrears of interest should accumulate to such an amount as, together with the principal, to exceed the penalty of the bond, the creditor can claim no more than the penalty either at law (*k*) or in equity (*l*). If, however, there be special circumstances in the creditor's favour, as if he have a mortgage also for the principal and interest (*m*), or if the debtor has been delaying him by vexatious proceedings (*n*), equity will then aid him to the full extent of his demand (*o*).

Creditor can recover no more than the penalty.

Except in special circumstances.

(*i*) Litt. s. 340.

(*j*) Stat. 4 & 5 Anne, c. 16, ss. 12, 13. See 3 Bur. 1373; 2 Bla. Com. 341; *Smith* v. *Bond*, 10 Bing. 125; S. C. 3 Moo. & Scott, 528; *James* v. *Thomas*, 5 Barn. & Adol. 40.

(*k*) *Wild* v. *Clarkson*, 6 T. R. 303.

(*l*) *Clarke* v. *Seton*, 6 Ves. 411; *Hughes* v. *Wynne*, 1 My. & Keen, 20.

(*m*) *Clarke* v. *Lord Abingdon*, 17 Ves. 106.

(*n*) *Grant* v. *Grant*, 3 Sim. 430.

(*o*) 6 Ves. 416. By the Stamp Act, 33 & 34 Vict. c. 97, bonds for securing the payment or repayment of money, or the transfer or retransfer of stock, are liable to the same *ad valorem* duty as mortgages for the like purpose. See Principles of the Law of Real Property, p. 404, 9th ed.; 407, 10th ed.

Bonds for performance of agreements.

Bonds are frequently given, not only for securing the payment of money on a given day, but also with conditions to be void on the performance of many other acts agreed to be done, or on the payment of money by instalments. In such cases the law formerly was, that, on the breach of any part of the condition, the whole penalty became due; and judgment and execution might be had thereon, subject only to the control of a court of equity on application to it for relief. But now in such cases the obligee (or person to whom the bond is made) must, in bringing his action, state or *assign* the breaches which have been made by the obligor (*p*); and although judgment is still recovered for the whole penalty, execution of such judgment is allowed to issue only for the damages in respect of the breaches actually committed; and the judgment remains as a further security for the damages to be sustained by any future breach (*q*). Although bonds and covenants have been deprived of all priority in administration over simple contract debts, they still continue in use. And the fact that a bond or covenant may be enforced at any time within twenty years, whilst a simple contract debt cannot be enforced after six years, is a reason for their employment.

Assignment of breaches.

Simple contract debts.

The last and most numerous, though least important, class of debts in the eye of the law are debts by simple contract, which are all debts not secured by the evidence of a court of record, or by deed or specialty. On the decease of the debtor, these debts were formerly payable out of his personal estate, by his executor or administrator, subsequently to all debts of record or by

(*p*) See the judgment of Parke, B., in *Grey* v. *Friar*, 15 Q. B. 891, 910; *Wheelhouse* v. *Ladbrooke*, 3 H. & N. 291.

(*q*) Stat. 8 & 9 Will. III. c. 11, s. 8; *Hardy* v. *Bern*, 5 T. R. 636; *Willoughby* v. *Swinton*, 6 East, 550; 1 Wms. Saund. 57, n. (1); *Hurst* v. *Jennings*, 5 Bar. & Cress. 650; S. C. 8 Dow. & Ry. 424.

specialty, except voluntary bonds, which were payable after all simple contract debts, but before any of the legacies (*r*). But now, as we have seen, all simple contract debts will be payable pari passu with debts secured by specialty. Voluntary bonds and covenants under seal will still be probably continued in use, inasmuch as every deed imports a consideration (*s*), and an action at law may consequently be brought upon a voluntary deed which would not lie upon a mere voluntary contract. But in administration voluntary bonds and covenants will still be payable after other debts for valuable consideration, whether specialty or simple contract. Debts secured by bills of exchange and promissory notes have no preference over the other simple contract debts of the deceased (*t*).

Voluntary bonds.

Voluntary bonds and covenants.

Bills and notes.

Thus it will be seen that until recently there were, according to the law of England, five principal kinds of debts, namely, crown debts, judgment debts, specialty debts in which the heirs were bound, specialty debts in which the heirs were not bound, and simple contract debts. Each of these classes had a law of its own, and remedies of varying degrees of efficacy. According to natural justice one would suppose that all creditors for valuable consideration should have an equal right to be paid; or if any difference were allowed, that those who could least afford to lose should be preferred to the others. Our law, however, takes precisely the opposite course, and, for reasons which certainly illustrate the history of England, gives to the crown, representing the public in the aggregate, who can best afford to lose, a decided preference over private creditors, whose loss may be their ruin. Again, a debt admitted without dispute gives the creditor far less advantage than a debt which

Defects in the law of debtor and creditor.

(*r*) *Lomas* v. *Wright*, 2 My. & Keen, 769; *Watson* v. *Parker*, 6 Beav. 283.

(*s*) *Ante*, pp. 93, 94.

(*t*) *Yeoman* v. *Bradshaw*, 3 Salk. 164.

has been contested and decreed to be paid by the judgment of a court of record. The proper function of a court of judicature would seem to be the settlement of disputes. In our law, however, the judgment of the court is permitted to be made use of not only to settle contested claims, but also as a better security for money admitted to be due. The reason of this perversion of the proper end of a judgment has been the superior advantages possessed by a creditor having a judgment in his favour. So long, however, as the court exercises its legitimate function of deciding on contested claims, there seems to be no reason why a debt established by the decision of the court should have any preference over one which has never been disputed. If this were the case, the use of judgments as mere securities, by collusion or agreement of the parties, would at once fall to the ground; and an end would be put to a very fruitful source of litigation and fraud. Practically there are but two reasons why payment of a debt is withheld, namely, either because the debtor, though able to pay, doubts his liability, or because he is unable to pay, though he knows he is liable. In the first case an action at law decides the question; but the judgment given by the court in exercise of its proper function is scarcely ever followed by the taking out of execution. The debt being established, the debtor pays it, and the judgment is immediately satisfied. The creditor has the advantage of the decision of the court, but he has no occasion for any of those extraordinary remedies to which his position as a judgment creditor entitles him. If, however, the debtor is unable to pay, judgment is obtained merely for the sake of its fruit. The creditor endeavours, by suing out an execution, to obtain an advantage over other creditors, who may not have put themselves and the debtor to the same trouble and expense. But inability to pay one debt is presumptive evidence of inability to pay others; and when a man is

unable to pay all his creditors in full, it is time that a distribution should be made of his property amongst his creditors rateably. The extraordinary privileges conferred on a judgment creditor seem, therefore, in most cases, practically to end in an undue preference of a pressing creditor over others who have as good a right to be paid. With respect to the three last classes of debts, namely, debts by specialty in which the heirs are bound, those in which the heirs are not bound, and simple contract debts, the distinctions between them serve principally to mark the steps of the struggle by which the rights of creditors have at length been obtained. The trophies of a victory so hardly won can scarcely be expected to present a very orderly appearance. The rights of these creditors accordingly varied with the accident of the death of the debtor, with the proportion which his real estate might have borne to his personalty, and with the circumstance of his having or not having charged his real estate by his will with the payment of his debts; although, as we shall see, he could bring them all to a level by becoming a bankrupt if he pleased. It was surely time that the law of debtor and creditor should be placed upon some more simple and reasonable footing. This has now been done to a great extent, so far as judgments are concerned, by a provision in the Bankruptcy Act, 1861 (*u*), by which, as we have seen, the seizure and sale of the goods of a trader debtor, on an execution for a sum exceeding fifty pounds, was made an act of bankruptcy. And this, though now repealed (*x*), has been re-enacted by the Bankruptcy Act, 1869 (*y*), with respect to sums *not less than* fifty pounds. The act which has placed specialty and simple contract creditors on the same footing at the debtor's decease (*z*) is an important fur-

Much has now been done.

(*u*) Stat. 24 & 25 Vict. c. 134, s. 73.

(*x*) Stat. 32 & 33 Vict. c. 83.

(*y*) Stat. 32 & 33 Vict. c. 71, s. 6, par. (5).

(*z*) Stat. 32 & 33 Vict. c. 46.

ther step in the right direction. So is the Ecclesiastical Dilapidations Act, 1871 (*a*), by which claims for dilapidations made by a succeeding incumbent against the personal representatives of his predecessor now rank with other debts. Further improvements, however, might still be made. There seems no reason why a debt for rent should have priority in payment out of the personal estate of the deceased tenant over his other just debts (*b*); and with regard to Crown debts and judgment debts the author's opinion has already been expressed.

Suggested improvements.

Interest on debts.

The next subject which claims our attention is that of interest upon debts. The absurd prejudice which anciently caused interest, under the name of usury, to be considered unlawful, retained some hold upon our law long after the taking of interest was rendered lawful by act of parliament (*c*). In ordinary cases a debtor was allowed to withhold payment of his debt, without being obliged to give to his creditor the poor recompense of interest on the money he was making use of for his own benefit. For until recently it was a general rule of law, that interest was not payable on any debts, whether by specialty or simple contract, unless expressly agreed on, or unless a promise could be implied from the usage of trade or other circumstances, or unless the debt were secured by a bill of exchange or promissory note, which, being mercantile securities, always carried interest (*d*). But in equity interest was more frequently allowed (*e*). And now, by an act of King William the

(*a*) Stat. 34 & 35 Vict. c. 43; *ante*, p. 74.

(*b*) *Ante*, p. 112.

(*c*) Stat. 37 Hen. VIII. c. 9. See *ante*, p. 5.

(*d*) *Higgins* v. *Sargent*, 2 Barn. & Cress. 348; S. C. 3 Dow. & Ry. 613; *Foster* v. *Weston*, 6 Bing. 709; *Page* v. *Newman*, 9 Barn. & Cress. 378.

(*e*) See *Lowndes* v. *Collins*, 17 Ves. 27; 2 Fonb. Eq. 429; C. P. Cooper, 246 *et seq.*

Fourth (*f*), interest is recoverable on all debts payable by virtue of any written instrument, at a certain time, from the time when such debts were payable, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.

Sureties.

The payment of a debt is sometimes secured by a *surety*, who makes himself liable, together with the principal debtor, for the payment. If the surety should pay the debt, he will become the creditor of the principal debtor for the amount; but although the debt paid should have been secured to the original creditor by the bond under seal of the debtor and his surety, the surety, having paid the debt, would until recently have become the simple contract creditor only of the principal debtor; unless he should have taken the precaution to procure from such debtor a counter-bond for his own indemnity (*g*). The surety, however, would have been entitled to the benefit of all collateral securities which the creditor, whom he had repaid, held for the debt; but he was not to be entitled to the original bond executed by the debtor, because that was at an end by the very fact of the payment (*h*). In the words of Lord Brougham (*i*), the court admitted the surety's right, as against the principal debtor, to stand in the shoes of the creditor, but said there were no shoes for him to stand in. But by a recent enactment every surety who pays a debt is now entitled to have assigned to him

New enactment.

(*f*) Stat. 3 & 4 Will. IV. c. 42, ss. 28, 29; *Hyde* v. *Priee*, 8 Sim. 578.

(*g*) *Copis* v. *Middleton*, Turn. & Russ. 224.

(*h*) Turn. & Russ. 231; *Dowbiggen* v. *Bourne*, 2 You. & Coll. 462; *Jones* v. *Davids*, 4 Russ. 277; *Caulfield* v. *Maguire*, 2 Jones & Lat. 164, 168.

(*i*) *Hodgson* v. *Shaw*, 3 My. & Keen, 183, 194.

every judgment, specialty or other security which shall be held by the creditor in respect of such debt, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt; and such person shall be entitled to stand in the place of the creditor and to use all the remedies, and, if need be and upon a proper indemnity, the name of the creditor, in any action to obtain from the principal debtor indemnification for his loss; and the payment made by the surety shall not be pleadable in bar of any action or other proceeding by him (*k*). If there should have been more than one surety, any one surety, paying the whole debt, is entitled, according to the general principles of justice, to contribution from his co-sureties in equal shares, or if they should have been sureties to unequal amounts, then in proportion to the respective amounts to which they have made themselves liable (*l*). And the remedies given by the act above mentioned are extended to co-sureties; provided that no co-surety shall be entitled to recover from any other co-surety, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable (*m*). In equity, if any surety has become insolvent, the others must contribute rateably to the payment of the whole debt (*n*). But if the surety has paid no more than his own proportion of the debt he cannot obtain contribution from any of the others (*o*); nor will contribution be allowed when the suretyship of one person is a distinct transaction from that of the others (*p*).

Co-sureties.

(*k*) Stat. 19 & 20 Vict. c. 97, s. 5; *Lockhart* v. *Reilley*, 1 De Gex & Jones, 464.

(*l*) *Deering* v. *Earl of Winchelsea*, 2 Bos. & Pul. 270, 272, 273; *Brown* v. *Lee*, 6 Barn. & Cress. 689; S. C. 9 D. & R. 701.

(*m*) Stat. 19 & 20 Vict. c. 97, s. 5.

(*n*) *Peter* v. *Rich*, 1 Cha. Rep. 34; *Hitchman* v. *Stewart*, 3 Drewry, 271.

(*o*) *Ex parte Gifford*, 6 Ves. 807; *Davies* v. *Humphreys*, 6 Mee. & Wels. 153, 168, 169.

(*p*) *Coope* v. *Twyman*, T. & Russ. 426; *Craythorne* v. *Swin-*

Discharge of surety.

A surety, however, may be discharged from his liability by the conduct of the creditor. As surety he has made himself liable only for the payment of a particular debt at a given time, or under certain given circumstances. If therefore the creditor, by any subsequent arrangement with the principal debtor, preclude himself from demanding payment of his debt at the time or under the circumstances originally agreed on, the surety will be at once discharged from all liability (*q*). Thus if the creditor bind himself to give further time for payment to the principal debtor (*r*), or compound with him, without expressly reserving his remedy against the surety (*s*), the surety will be discharged. But the acceptance by the creditor from the principal debtor of a new and independent security for the debt will not discharge the surety (*t*). Neither will the surety be discharged by the mere neglect of the creditor to enforce payment of the debt from the principal debtor at the time of its becoming due (*u*); nor by the creditor's express agreement to give time to the principal debtor, if such agreement fail in any of the requisites of a binding contract (*x*).

burne, 14 Ves. 160; *Pendlebury* v. *Walker*, 4 You. & Coll. 424.

(*q*) *Calvert* v. *London Dock Company*, 2 Keen, 638; *Heath* v. *Key*, 1 Y. & Jerv. 434; *Nicholson* v. *Revill*, 4 Ad. & Ell. 675, 683; *Blake* v. *White*, 1 You. & Coll. 420; *Borser* v. *Cox*, 4 Beav. 879; 6 Beav. 110; and see *Squire* v. *Whitton*, 1 H. of L. Cases, 333.

(*r*) *Samuel* v. *Howarth*, 3 Meriv. 272; *Eyre* v. *Bartrop*, 3 Madd. 221; *Moss* v. *Hall*, 5 Ex. Rep. 46; *Davies* v. *Stainbank*, 6 De Gex, M. & G. 679; *Bailey* v. *Edwards*, 4 Best & Smith, 761.

(*s*) *Ex parte Gifford*, 6 Ves. 807; *Ex parte Carstairs*, Buck, 560; *Maltby* v. *Carstairs*, 7 Bar. & Cress. 737; S. C. 1 Man. & Ry. 549; *Thompson* v. *Lack*, 3 C. B. 540; *Owen* v. *Homan*, 4 House of Lords Cases, 997; *Close* v. *Close*, 4 De Gex, M. & G. 176; *Webb* v. *Hewitt*, 3 Kay & John. 438; *Boaler* v. *Mayor*, 19 C. B., N. S. 76.

(*t*) *Bell* v. *Banks*, 3 Man. & Gr. 258.

(*u*) *Eyre* v. *Everett*, 2 Russ. 381; *Peel* v. *Tatlock*, 1 B. & P. 419.

(*x*) *Philpot* v. *Briant*, 4 Bing. 717; *Tucker* v. *Laing*, 2 Kay & John. 745.

Alienation of debts.

We now approach the subject of the alienation of debts, to which some reference has already been made. We have seen that a debt was anciently considered as a mere right to bring an action against the debtor, and as such was incapable of being transferred (*y*). In process of time, however, an assignment of a debt was permitted to take place by means of an authority from the creditor to his assignee to sue the debtor in the creditor's name.

Power of attorney.

This authority is usually called a *power of attorney*, which need not be by deed, but may be by writing unsealed (*z*), or even by parol (*a*); and when a debt is a *legal* debt, recoverable only in a court of law, it cannot be effectually assigned without such a power. The assignment of debts by means of powers of attorney is now recognized and protected by the courts of law. Thus in a case where the original creditor became bankrupt after he had assigned his debt, it was held that an action against the debtor might still be properly brought in the name of such original creditor, by virtue of the power of attorney which he had given to his assignee; although, if no assignment had been made, the assignees of the creditor under the bankruptcy would have been the proper parties to sue (*b*). So if a power of attorney be given on an assignment of a debt for a valuable consideration, it is held to be irrevocable by the assignor (*c*). When a debt or demand is *equitable* only, that is, of a nature to be recoverable only in the Court of Chancery, it may be assigned without a power of attorney; for equity will allow the assignee to sue in his own name.

Life and sea policies.

The same privilege has recently been extended by Parliament to monies secured by policies of assurance of

(*y*) *Ante*, p. 4.

(*z*) *Howell* v. *M'Ivers*, 4 T. R. 690.

(*a*) *Heath* v. *Hall*, 4 Taunt. 326.

(*b*) *Winch* v. *Keeley*, 1 T. R. 619; *Parnham* v. *Hurst*, 8 Mee. & Wels. 743. See *De Pothonier* v. *De Mattos*, 1 E. B. & E. 461.

(*c*) *Walsh* v. *Whitcomb*, 2 Esp. 565.

lives (*d*), and also to policies of marine assurance (*e*); and it is to be hoped that it may one day be extended to every other legal debt. When a debt is assigned, the title of the assignee is not complete until he has given to the debtor notice of the assignment (*f*); for the debtor, if he has had no notice of the assignment, may lawfully pay his debt to the original creditor, and will be effectually discharged by his receipt.

Notice to the debtor.

Bills of exchange and promissory notes are, as we have already seen (*g*), exceptions to the rule which requires a power of attorney to enable the assignee to sue the debtor for the debt assigned. The custom of merchants was in ancient times sufficiently powerful to countervail in this respect the strictness of the common law, and the holder of a bill of exchange was able to sue upon it in his own name. By a statute of Anne (*h*), promissory notes were made assignable or indorsable over in the same manner as inland bills of exchange might be according to the custom of merchants.

Bills and notes.

Debts, being formerly considered as mere rights of action, could not be taken in execution on a judgment obtained against the creditor. But when they are secured by some cheque, bill, note, bond, specialty or other security (*i*), the act for extending the remedies of creditors against the property of debtors (*k*) provides that under the writ of *fieri facias* (*l*) the sheriff may seize not only money and bank notes, but also the securities above mentioned, and may sue upon them in his own name on the arrival of the time of payment; but

Involuntary alienation of debts.

(*d*) Stat. 30 & 31 Vict. c. 144.

(*e*) Stat. 31 & 32 Vict. c. 86.

(*f*) See *post*, the chapter on Title.

(*g*) *Ante*, p. 4.

(*h*) Stat. 3 & 4 Anne, c. 9, made perpetual by stat. 7 Anne, c. 25.

(*i*) *Harrison* v. *Paynter*, 6 Mee. & Wels. 387; *Wood* v. *Wood*, 4 Q. B. 397.

(*k*) Stat. 1 & 2 Vict. c. 110, s. 12.

(*l*) See *ante*, p. 53.

the sheriff is not bound to sue, unless indemnified in the manner prescribed by the acts from the costs of the action. And the Common Law Procedure Act, 1854, now enables the court or a judge to order the examination of any judgment debtor as to any and what debts are owing to him (*m*); and a judge may, on the application of the judgment creditor, either before or after such examination, order that all debts owing from any third person (in the act called the garnishee) to the judgment debtor shall be attached to answer the judgment debt (*n*). And payment made by the garnishee, or execution levied upon him under the provisions of the act, for the amount of his debt, is a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceedings may be set aside, or the judgment reversed (*o*). And the Common Law Procedure Act, 1860, further provides that if it be suggested by the garnishee that the debt sought to be attached belongs to some third person who has a lien or charge upon it, the judge may order such third person to appear before him, and may order execution to issue to levy the amount due from such garnishee, or the judgment creditor to proceed against the garnishee; and he may bar the claim of such third person, or make such other order as he shall think just (*p*).

Common Law Procedure Act, 1854.

Garnishee.

Common Law Procedure Act, 1860.

Bankruptcy.

In the event of bankruptcy, the assignees of the bankrupt were empowered to sue for debts owing to him in their own names for the benefit of his creditors (*q*).

(*m*) Stat. 17 & 18 Vict. c. 125, s. 60.

(*n*) Ibid. s. 61.

(*o*) Stat. 17 & 18 Vict. c. 125, s. 65. See *Holmes* v. *Tutton*, 5 E. & B. 65.

(*p*) Stat. 23 & 24 Vict. c. 126, ss. 28—31.

(*q*) Stat. 12 & 13 Vict. c. 106, s. 141, repealing stats. 6 Geo. IV. c. 16, s. 63, and 1 & 2 Will. IV. c. 56, s. 25; and now repealed by stat. 32 & 33 Vict. c. 83. And see stat. 15 & 16 Vict. c. 76, s. 142, as to the bankruptcy of a plaintiff in an action at law.

And now by the Bankruptcy Act, 1869 (*r*), a trustee of a bankrupt may sue and be sued by the official name of "The trustee of the property of A. B., a bankrupt." And any person, to whom anything in action belonging to the bankrupt is assigned in pursuance of that act, may bring or defend any action or suit relating to such thing in action in his own name (*s*).

Payment of debts.

We have now to consider the payment of debts. And, in the first place, the payment of a smaller sum is no satisfaction of a larger one, unless there be some consideration for the relinquishment of the residue (*t*), such as the payment at an earlier time than the whole is due (*u*), or the concurrence of some (*x*) or all of the other creditors of the debtor in accepting a composition (*y*). But it seems that the acceptance of a *negotiable security* for a small amount may be a good satisfaction for a larger debt (*z*); and the payment of a small sum may be a good satisfaction for an unliquidated demand for large pecuniary damages, on account of the uncertainty of such a claim (*a*). When a less sum is paid to the creditor than the whole amount of his demands, it is competent to the debtor to make the payment in satisfaction of any demand he may please, and the creditor must appropriate the payment accordingly (*b*); but if the payment be made generally, without any express appropriation, the creditor may elect,

Payment of smaller sum no satisfaction of larger.

Appropriation of payments.

(*r*) Stat. 32 & 33 Vict. c. 71, ss. 22, 83, par. (7).

(*s*) Sect. 111.

(*t*) *Cumber* v. *Wane*, 1 Strange, 425; S. C. 1 Smith's Leading Cases, 146; *Fitch* v. *Sutton*, 5 East, 230.

(*u*) Co. Litt. 212 b.

(*x*) *Norman* v. *Thompson*, 4 Ex. Rep. 755.

(*y*) *Reay* v. *Richardson*, 2 Cro. Mee. & Rose. 422; *Pfleger* v. *Browne*, 28 Beav. 391.

(*z*) *Sibree* v. *Tripp*, 15 Mee. & Wels. 23.

(*a*) *Wilkinson* v. *Byers*, 1 Ad. & Ell. 106.

(*b*) *Shaw* v. *Picton*, 4 Barn. & Cress. 715; *Nash* v. *Hodgson*, Ld. C. & Lds. Justices, 1 Jur., N. S. 946; 6 De Gex, M. & G. 474.

at the time of payment (*c*), or within a reasonable time after (*d*), to appropriate the money to whichever demand he may please. And if no election as to the appropriation of the payment should be made on either side, the law will, in ordinary cases of current accounts, presume that the first item on the debit side is discharged or reduced by the first payment entered on the credit side, and so on in the order of time (*e*). When the debt carries interest, the payment is considered to be applied in the first place in discharge of the interest then due, and the surplus, if any, in discharge *pro tanto* of the principal. For no creditor would apply any payment to the discharge of part of the principal, which carries interest, instead of to the discharge of interest for which, when due, no further interest is payable (*f*).

Composition with creditors.

When a person becomes so embarrassed as to be unable to pay all his debts in full, he usually endeavours to enter into a composition with his creditors, prevailing on them to accept so much in the pound, and to allow a given time for payment. In this case a *letter of licence* is generally given by the creditors, by which they covenant not to take any proceedings for their debts in the meantime; and this licence is frequently embodied in a *deed of inspectorship*, by which certain inspectors are appointed to watch the winding-up of the debtor's affairs on behalf of the creditors. The payment of the composition is sometimes guaranteed by some friends of the debtor as his sureties, and when payment is made, a release of all demands is given by the creditors. If, however, the composition should not be punctually paid, the creditors will no longer be restrained from proceed-

(*c*) *Devaynes* v. *Noble*, 1 Mer. 604.

(*d*) *Simson* v. *Ingham*, 2 Barn. & Cress. 65.

(*e*) 1 Meriv. 608; *Williams* v. *Rawlinson*, 10 J. B. Moore, 362; *Merriman* v. *Ward*, 1 John. & H. 371.

(*f*) *Bower* v. *Marris*, 1 Cr. & Phi. 351, 355.

ing to enforce the full payment of their debts (*g*). Such creditors as hold security for their debts should openly stipulate that their securities are not to be affected; and such a stipulation will be sufficient to preserve them (*h*). But any secret agreement between the debtor and a creditor, by which he is to have any advantage over the others, in order to induce him to agree to the composition, is evidently a fraud on the other creditors, and as such is absolutely void (*i*), and prevents the creditor who is party to it from suing for his share in the composition (*k*).

Bankruptcy Act, 1861.

The Bankruptcy Act, 1861 (*l*), provided, that every deed, instrument or agreement whatsoever, by which a debtor, not being a bankrupt, conveyed, or covenanted or agreed to convey his estate and effects, or the principal part thereof, for the benefit of his creditors, or made any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management or winding-up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, should, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the Court in London should allow (*m*), be registered in the Court

(*g*) *Cranley* v. *Hillary*, 2 Mau. & Selw. 120.

(*h*) *Nichols* v. *Morris*, 3 Barn. & Adol. 41; *Ex parte Glendinning*, Buck, 517; *Lee* v. *Lockhart*, 3 Mylne & Craig, 302; *Cullingworth* v. *Lloyd*, 3 Beav. 385, and the cases collected, p. 395; *Bush* v. *Shipman*, 14 Sim. 239.

(*i*) *Leicester* v. *Rose*, 4 East, 372; *Knight* v. *Hunt*, 5 Bing. 432; *Pendlebury* v. *Walker*, 4 You. & Coll. 424; *Alsager* v. *Spalding*, 4 N. C. 407; *Higgins* v. *Pitt*, 4 Ex. Rep. 312; *Pfleger* v. *Browne*, 28 Beav. 391; *Mare* v. *Warner*, 3 Giff. 100; *Mare* v. *Earle*, 3 Giff. 108.

(*k*) *Howden* v. *Haigh*, 11 Adol. & Ell. 1033; *Ex parte Oliver*, 4 De Gex & Smale, 354. See *Atkinson* v. *Denby*, 7 H. & N. 934.

(*l*) Stat. 24 & 25 Vict. c. 134, s. 194; *Ex parte Atkinson*, *In re Brooksbank*, 18 W. R. 598; Law Rep., 9 Eq. 736.

(*m*) *Wishart* v. *Fowler*, 4 Best & Smith, 674.

of Bankruptcy; and in default thereof should not be received in evidence. And every such deed, on being so registered as aforesaid, should have a memorandum thereof written on the face of such deed, stating the day and the hour of the day at which the same was brought into the office of the Chief Registrar for registration (*n*). But this act has now been repealed (*o*).

Now repealed.

Assignment to trustees for creditors void as an act of bankruptcy.

In some cases an assignment of the debtor's estate and effects was made to trustees for sale and conversion into money, to be divided rateably amongst the creditors. As however this is the process adopted by the law in cases of bankruptcy, where it is carried on under judicial sanction, the law considered that such an assignment of the whole of the estate of the debtor was an act of bankruptcy, and as such void, if there were any creditor or creditors who had not concurred in it of sufficient amount to sue out a petition for adjudication of bankruptcy (*p*). And now the Bankruptcy Act, 1869 (*q*), has expressly made the following act, amongst others, an act of bankruptcy, viz., that the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally. An exception to this rule was formerly made, if a petition for adjudication of bankruptcy did not issue within three calendar months from the execution of such a deed by any trader, provided the deed were executed by every trustee within fifteen days after the execution thereof by the trader, and that the execution by such trader and by every such trustee were attested by an attorney or solicitor;

Exception formerly made.

(*n*) Sect. 196; *Stanger* v. *Miller*, Ex. 11 Jur., N. S. 1005.

(*o*) Stat. 32 & 33 Vict. c. 83.

(*p*) *Tappenden* v. *Burgess*, 4 East, 230; *Dutton* v. *Morrison*, 17 Ves. 193, 199; *Powell* v. *Lloyd*, 2 You. & Jerv. 372; *Ex parte Philpott*, Court of Review, 10 Jur. 717. See *post*, the chapter on Bankruptcy of Traders.

(*q*) Stat. 32 & 33 Vict. c. 71 s. 6, par. (1).

and provided that notice were given within one month after the execution thereof by such trader in the London Gazette and two London daily newspapers, if he resided in London or within forty miles of it; or in the London Gazette, one London daily newspaper, and one provincial newspaper published near to such trader's residence, if he did not reside within forty miles of London, and such notice was required to contain the date and execution of the deed, and the name and place of abode respectively of every such trustee and of such attorney or solicitor (*r*). But every such deed was required to be registered, as we have seen, in the Court of Bankruptcy (*s*), and to be stamped, in addition to the ordinary stamp duty, with a stamp denoting a duty computed at the rate of five shillings upon every hundred pounds, or fraction of a hundred pounds, of the sworn or certified value of the estate or effects comprised in or to be collected or distributed under such deed or instrument; provided, that the maximum of *ad valorem* duty payable in respect of any such deed or instrument should be two hundred pounds (*t*). But these enactments are now repealed (*u*), and no exception is admitted to the rule, that every conveyance of a debtor's property to trustees for his creditors generally is an act of bankruptcy.

Deed to be registered.

Stamp duty.

The Bankrupt Law Consolidation Act, 1849, contained provisions by which deeds of arrangement between a trader and his creditors, signed by six-sevenths in number and value of those creditors whose debts amounted to ten pounds and upwards, were binding on all the creditors (*x*). These provisions were repealed by the Bankruptcy Act, 1861 (*y*), which substituted

Arrangements by deed.

(*r*) Stat. 12 & 13 Vict. c. 106, s. 68, repealing stat. 6 Geo. IV. c. 16, s. 4.

(*s*) Stat. 24 & 25 Vict. c. 134, s. 294, *ante*, p. 129.

(*t*) Sect. 195.

(*u*) Stat. 32 & 33 Vict. c. 83.

(*x*) Stat. 12 & 13 Vict. c. 106, s. 224.

(*y*) Stat. 24 & 25 Vict. c. 134, s. 192.

for them other enactments, which applied to all debtors, whether traders or not. These enactments have been themselves repealed by the Bankruptcy Repeal and Insolvent Court Act, 1869 (*z*); but as some knowledge of their provisions will for some time be practically necessary, it may be desirable to state them shortly. Every deed between a debtor and his creditors, relating to his debts or liabilities, and his release therefrom, or the distribution, inspection, management and winding-up of his estate, or any of such matters, was rendered binding on all the creditors of such debtor, provided the following conditions were observed; that is to say, (1.) A majority in number, representing three-fourths in value of the creditors of such debtor, whose debts respectively amounted to ten pounds and upwards, should, before or after the execution thereof by the debtor, have in writing assented to or approved of such deed or instrument. (2.) If a trustee or trustees were appointed by such deed or instrument, such trustee or trustees should have executed the same. (3.) The execution of such deed or instrument by the debtor should have been attested by an attorney or solicitor. (4.) Within twenty-eight days from the execution of such deed or instrument by the debtor, the same should have been produced and left (having been first duly stamped) at the office of the Chief Registrar, for the purpose of being registered. (5.) Together with such deed or instrument there should have been delivered to the Chief Registrar an affidavit by the debtor, or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value of the creditors of the debtor whose debts amounted to ten pounds or upwards, had in writing assented to or approved of such deed or instrument; and also stating the amount in value of the property

(*z*) Stat. 32 & 33 Vict. c. 83.

and credits of the debtor comprised in such deed. (6.) Such deed or instrument should, before registration, bear such ordinary and *ad valorem* stamp duties as were by the act provided (*a*). (7.) Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor could have given or ordered possession, should have been given to the trustees (*b*).

The Bankruptcy Amendment Act, 1868 (*c*), required statements to be added, containing particulars (1) of the debts and liabilities of the debtor, and (2) of the debtor's property and credits. It also contained other provisions, which it is hardly necessary to state, as this act also has been repealed by the Bankruptcy Repeal and Insolvent Court Act, 1869 (*d*).

The statutory form of conveyance for the benefit of creditors, provided by the Bankruptcy Act, 1861, contained no release of the debtor by his creditors from their debts, and consequently could not be pleaded by the debtor in bar to an action by a creditor for his debt (*e*). If, however, a release by the creditors had been inserted in the deed, or were the necessary effect of its provisions, it was pleadable in bar to an action by a non-assenting creditor (*f*). All the creditors of the debtor, and not merely those who executed the deed, ought to have been equally benefited by its pro-

The statutory form of conveyance did not release the debtor.

(*a*) Stat. 24 & 25 Vict. c. 134, s. 195. See *ante*, p. 131.
(*b*) Sect. 192.
(*c*) Stat. 31 & 32 Vict. c. 104.
(*d*) Stat. 32 & 33 Vict. c. 83.
(*e*) *Eyre* v. *Archer*, 16 C. B., N. S. 638; *Jones* v. *Morris*, Q. B. 11 Jur., N. S. 812; *Clarke* v. *Williams*, Exch. Cham. 13 W. R. 923; 34 L. J., Ex. 189.
(*f*) *Chapman* v. *Atkinson*, 4 B. & S. 722; *Whitehead* v. *Porter*, 5 B. & S. 193; *Garrod* v. *Simpson*, Ex. 11 Jur., N. S. 227; *Wills* v. *Bacon*, 5 B. & S. 196; *Dewhirst* v. *Jones*, 3 H. & C. 60.

visions (*g*); and the deed must not have contained any unreasonable stipulation, by which the non-assenting creditors might have been prejudiced (*h*). It was unreasonable if the executing creditors were paid down a composition, which the non-assenting creditors had only a covenant to pay (*i*); or even if the executing creditors had the benefit of a covenant, of which the non-assenting creditors could not avail themselves (*k*). But it was held not unreasonable to empower the trustees of the deed to require persons claiming to be creditors to verify their debts or claims by statutory declaration proved before the commissioners of bankruptcy, or otherwise, as the trustees might think fit (*l*). Nor was it unreasonable to give the trustees a discretion as to the sale and management of the estate, or power to sell to the debtor himself (*m*), or a discretion as to the amount and manner of payment of dividends, or as to the enforcement of payment of debts. And the value of securities held by creditors might reasonably have been ascertained by valuers, or an umpire appointed in the usual way (*n*). Again, a covenant in a composition deed not to sue the debtor for a limited time was not

Unreasonable stipulations.

Reasonable stipulations.

(*g*) *Walter* v. *Adcock*, 7 H. & N. 541; *Ex parte Godden*, L. J., 32 L. J., Bank. 37; *Dewhirst* v. *Kershaw*, 1 H. & C. 726; *Ilderton* v. *Castrique*, 14 C. B., N. S. 99; *Ex parte Cockburn, Re Smith*, L. C., 12 W. R. 184, 673; 10 Jur., N. S. 573; *Benham* v. *Broadhurst*, 3 H. & C. 472; *Chesterfield and Midland Silkstone Colliery Company, Limited*, v. *Hawkins*, 3 H. & C. 677.

(*h*) *Woods* v. *Foote*, 1 H. & C. 841; *Inglebach* v. *Nicholls*, 14 C. B., N. S. 85; *Killby* v. *Wright*, 18 C. B., N. S. 272; *Nicholson* v. *Potts*, Exch. Cham. 12 W. R. 440.

(*i*) *Ex parte Cockburn, Re Smith, ubi sup.*

(*k*) *Benham* v. *Broadhurst; Chesterfield and Midland Silkstone Colliery Company, Limited*, v. *Hawkins, ubi sup.* And see *Gresty* v. *Gibson*, 1 Law Rep., Ex. 112; *Reeves* v. *Watts*, Q. B. 12 Jur., N. S. 565.

(*l*) *Coles* v. *Turner*, Exch. Cham. 1 Law Rep., C. P. 373.

(*m*) *Greenberg* v. *Ward*, C. P. 12 Jur., N. S. 524; 1 Law Rep., C. P. 585.

(*n*) *Coles* v. *Turner, ubi sup.*

unreasonable (*o*); nor was a power to revoke a letter of licence given to the debtor (*p*). In estimating the requisite majority, secured as well as unsecured creditors were required to be taken into account (*q*). But this was altered by the Bankruptcy Amendment Act, 1868 (*r*), which required that the amount due to each secured creditor, after deducting the value of his securities on the debtor's property, should alone be reckoned. And the deed of composition was not required to provide for the distribution of the whole of the debtor's estate amongst his creditors (*s*) as was required by the corresponding section of the Act of 1849 (*t*).

Regulations as to composition by creditors.

The Bankruptcy Act, 1869, now contains the following provisions with respect to composition with creditors (*u*):—"The creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. An extraordinary resolution of creditors shall be a resolution which has been passed by

(*o*) *Hidson* v. *Barclay*, 3 H. & C. 361; *Walker* v. *Nevill*, 3 H. & C. 403.

(*p*) *Walker* v. *Nevill*, *ubi sup.*

(*q*) *King* v. *Rendall*, 14 C. B., N. S. 721; *Ex parte Godden*, 1 De Gex, J. & S. 260; *Turquand* v. *Moss*, 17 C. B., N. S. 15.

(*r*) Stat. 31 & 32 Vict. c. 104, s. 3.

(*s*) *Re Rawlings*, L. J., 1 De Gex, J. & S. 225; 9 Jur., N. S. 316; *Ex parte Morgan*, L. C., 9 Jur., N. S. 559; 1 De Gex, J. & S. 283; *Clapham* v. *Atkinson*, 4 B. & S. 722.

(*t*) *Tetley* v. *Taylor*, 1 E. & B. 521; *Drew* v. *Collins*, 6 Ex. Rep. 670; *March* v. *Warwick*, 1 H. & N. 158; *Macnaught* v. *Russell*, 1 H. & N. 611; *Irving* v. *Gray*, 3 H. & N. 34; *Bloomer* v. *Darkes*, 2 C. B., N. S. 165; *Cruger* v. *Dunlop*, 7 H. & N. 525.

(*u*) Stat. 32 & 33 Vict. c. 71, s. 126. *Ex parte Birmingham Gas Light and Coke Company, In re Adams*, Law Rep., 11 Eq. 204; *Ex parte The Sheriff of Middlesex, In re England*, Law Rep., 12 Eq. 207; *In re Hatton*, Law Rep., 7 Ch. Ap. 723.

a majority in number and three-fourths in value of the creditors of the debtor, assembled at a general meeting to be held in the manner prescribed, of which notice has been given in the prescribed manner, and has been confirmed by a majority in number and value of the creditors assembled at a subsequent general meeting, of which notice has been given in the prescribed manner, and held at an interval of not less than seven days nor more than fourteen days from the date of the meeting at which such resolution was first passed. In calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding ten pounds shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors shall, as nearly as circumstances admit, be estimated in the same way, and the same description of creditors shall be entitled to vote at such general meetings, as in bankruptcy. The debtor, unless prevented by sickness or other cause satisfactory to such meetings, shall be present at both the meetings at which the extraordinary resolution is passed, and shall answer any inquiries made of him, and he, or if he is so prevented from being at such meetings some one on his behalf, shall produce to the meetings a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due. The extraordinary resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section, and, if satisfied that it has been so passed, he shall forthwith register the resolution and statement of assets and debts, but until such registration has taken place, such resolution shall be of no validity; and any creditor of the debtor may inspect such statement at prescribed times,

and on payment of such fee, if any, as may be prescribed. The creditors may, by an extraordinary resolution, add to or vary the provisions of any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation; and any such extraordinary resolution shall be presented to the registrar in the same manner and with the same consequences as the extraordinary resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor, produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors. Where a debt arises on a bill of exchange or promissory note, if the debtor is ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor or person to whom it is payable, and any other particulars within his knowledge respecting the same, and the insertion of such particulars shall be deemed a sufficient description of the creditor of the debtor in respect of such debt, and any mistake made inadvertently by a debtor in the statement of his debts may be corrected after the prescribed notice has been given, with the consent of a general meeting of his creditors. The provisions of any composition made in pursuance of this section may be enforced by the court on a motion made in a summary manner by any person interested, and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules of court may be made in relation to proceedings on the occasion of the acceptance

of a composition by an extraordinary resolution of creditors, in the same manner and to the same extent and of the same authority as in respect of proceedings in bankruptcy. If it appear to the court on satisfactory evidence that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

CHAPTER IV.

OF BANKRUPTCY OF TRADERS.

UNDER some circumstances a debtor is discharged by law from his debt without any actual payment, or without payment of more than a part of it. This occurs in the case of bankruptcy.

The whole of the law of bankruptcy now depends on the Bankruptcy Act, 1869 (*a*), to make way for which all the previous bankruptcy acts have been repealed (*b*). The former acts were the Bankruptcy Act, 1861 (*c*), under which persons not in trade were for the first time liable to become bankrupt, and the Bankruptcy Act of 1849 (*d*), by which all the previous acts were repealed. Of these the most important was the statute of 6 Geo. IV. c. 16, "An Act to amend the Laws relating to Bankrupts," which had been amended and altered by various others (*e*), the provisions of which, with some alterations, were consolidated in the Act of 1849.

Who are traders.

Traders were defined by the Act of 1849 to be, all alum makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, curriers, cattle or sheep salesmen, coach proprietors, cow keepers, dyers, fullers, keepers of inns, taverns, hotels or coffee houses, lime burners, livery stable keepers, market

(*a*) Stat. 32 & 33 Vict. c. 71.
(*b*) By stat. 32 & 33 Vict. c. 83.
(*c*) Stat. 24 & 25 Vict. c. 134.
(*d*) Stat. 12 & 13 Vict. c. 106.
(*e*) 1 & 2 Will. IV. c. 56; 3 & 4 Will. IV. c. 47; 1 & 2 Vict. c. 110; 2 Vict. c. 11; 2 & 3 Vict. c. 29; 5 & 6 Vict. c. 122; 7 & 8 Vict. c. 96; 8 & 9 Vict. c. 48; 10 & 11 Vict. c. 102; 11 & 12 Vict. c. 86.

gardeners, millers, packers, printers, shipowners, shipwrights, victuallers, warehousemen, wharfingers, scriveners receiving other men's monies or estates into their trust or custody, persons insuring against perils of the sea, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise in gross or by retail, and all persons who either for themselves, or as agents or factors for others, seek their living by buying or selling, or by buying and letting for hire, or by the workmanship of goods or commodities. But no farmer, grazier, common labourer or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading companies established by charter or act of parliament, was to be deemed as such a trader liable to become bankrupt (*f*). And this enumeration has been repeated in the Bankruptcy Act, 1869, with the addition of sharebrokers, stockbrokers and stockjobbers (*g*). An attorney or solicitor, as such, is not a trader within the bankrupt law; but if he is in the habit of receiving his client's money into his own hands and investing it for them, and charging a compensation for so doing, in addition to his charges for other professional business, he will be liable to become bankrupt as a scrivener receiving other men's monies into his trust (*h*). An alien or denizen is within the bankrupt law; and so is a married woman carrying on trade for her separate use by the custom of London (*i*), or whilst her husband is undergoing sentence of transportation (*k*). But an infant under the age of twenty-one years cannot be a bankrupt, because by the law of England he cannot be

Attorney or solicitor not liable as such.

Alien or denizen.

Married woman.

Infant.

(*f*) Stat. 12 & 13 Vict. c. 106, s. 66.

(*g*) Stat. 32 & 33 Vict. c. 71, Schedule 1.

(*h*) *Malkin* v. *Adams*, 2 Rose, 28; *Ex parte Bath*, Mont. 82, 84, where the cases are collected. See also *Wilkinson* v. *Candlish*, 5 Ex. Rep. 91, 97; *Ex parte Dufaur*, 2 De Gex, M. & G. 246.

(*i*) *Ex parte Carrington*, 1 Atk. 206.

(*k*) *Ex parte Franks*, 7 Bing. 762; 1 M. & Scott, 1.

made liable on contracts entered into by him in the course of trade (*l*).

A person within the bankrupt laws becomes bankrupt by committing an *act of bankruptcy*. The following acts, if done with intent to defeat or delay the creditors of a trader, were acts of bankruptcy within the Act of 1849, namely, if any such trader should depart this realm, or being out of this realm should remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested or taken in execution for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested or taken in execution, or his goods, monies or chattels to be attached, sequestered or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery or transfer of any of his goods or chattels (*m*). It was also an act of bankruptcy for a trader to lie in prison for debt for fourteen days, or, having been committed or detained for debt, to escape out of prison or custody. But the Bankruptcy Act, 1861, provided that no debtor should be adjudged bankrupt on the ground of having lain in prison as aforesaid, unless, having been summoned, he should not offer such security for the debt in respect of which he was imprisoned or detained as the commissioner

Act of bankruptcy.

Lying in prison.

Escape.

(*l*) *Belton* v. *Hodges*, 9 Bing. 365, 370.

(*m*) Stat. 12 & 13 Vict. c. 106, s. 67; *Ex parte Bland*, 6 De Gex, M. & G. 757; *Johnson* v. *Fesenmeyer*, 25 Beav. 88; 3 De Gex & Jones, 13; *Pennell* v. *Reynolds*, 11 C. B., N. S. 709; *Ex parte Wensley*, 1 De Gex, J. & S. 273; *Topping* v. *Keysell*, 16 C. B., N. S. 258; *Young* v. *Fletcher*, 3 H. & Colt. 732.

or registrar, whose duty it would otherwise be to adjudicate, should deem reasonably sufficient (*n*). The act for the abolition of imprisonment for debt (*o*) has now rendered this provision unnecessary. And the Bankruptcy Act, 1869 (*p*), has summed up the above-mentioned acts of bankruptcy in the following terms:—

(1.) That the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally:

(2.) That the debtor has, in England or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof:

(3.) That the debtor has, with intent to defeat or delay his creditors, done any of the following things, namely, departed out of England, or being out of England remained out of England; or being a trader departed from his dwelling-house, or otherwise absented himself; or begun to keep house; or suffered himself to be outlawed.

Most of the above acts of bankruptcy have been such ever since a bankrupt was first defined by the statute of Elizabeth "touching orders for bankrupts" (*q*). Bankruptcy was then considered as a crime, and the bankrupt was called "an offender" (*r*). But in modern times bankruptcy has been looked upon as the proper remedy for a trader in embarrassed circumstances. He gives up all his property to his creditors, to be divided rateably amongst them; and, if his behaviour has been free from serious blame, he obtains a discharge from past

(*n*) Stat. 24 & 25 Vict. c. 134, s. 71.
(*o*) Stat. 32 & 33 Vict c. 62.
(*p*) Stat. 32 & 33 Vict. c. 71, s. 6.
(*q*) Stat. 13 Eliz. c. 7.
(*r*) Stat. 13 Eliz. c. 7, s. 10; 2 Black. Com. 471.

liabilities. Accordingly by the Bankruptcy Act, 1861, a person was enabled to commit an act of bankruptcy by making a formal declaration of his inability to meet his engagements (*s*). So the seizure and sale of the goods of a trader under an execution upon any judgment in a personal action for the recovery of any debt or money demand exceeding fifty pounds was an act of bankruptcy (*t*). The filing of a petition by or against a debtor in any court having jurisdiction for the relief of insolvent debtors in insolvency or bankruptcy in any of Her Majesty's dominions, colonies, or dependencies, and the adjudication of an act of insolvency or bankruptcy on such petition, was also evidence of an act of bankruptcy (*u*). An act of bankruptcy might also have been committed by non-payment after what was called a judgment debtor summons. Every judgment creditor who was entitled to sue out a writ of *capias ad satisfaciendum* (*x*) against the debtor in respect of any debt amounting to 50*l.*, exclusive of costs, might at the end of one week from the signing of judgment have sued out against any trader, whether he were in custody or not, a summons, called a judgment debtor summons, requiring him to appear, and to be examined respecting his ability to pay the debt (*y*). In like manner, where any decree or order of a court of equity, or order in bankruptcy, insolvency, or lunacy, directing the payment of money, had been disobeyed by the debtor, after having been duly served on him, and the person entitled to the money, or interested in enforcing payment of it, had obtained a peremptory order fixing a day for payment, and the debtor, being a trader, should not within seven days after service on him of the peremptory order, or within seven days after the day

Declaration of insolvency.

Seizure and sale of goods under an execution.

Insolvency in the colonies.

Judgment debtor summons.

(*s*) Stat. 24 & 25 Vict. c. 134, s. 72.
(*t*) Sect. 73.
(*u*) Sect. 75.
(*x*) See *ante*, p. 109.
(*y*) Stat. 24 & 25 Vict. c. 134, s. 76.

fixed by the peremptory order for payment (which should last have happened), have paid the money, or secured, or tendered, or compounded for it, to the satisfaction of the creditor, the creditor might at the end of those seven days have sued out against the debtor a judgment debtor summons (*z*). And if after service of such summons the debtor should not have paid the debt and costs, or secured or compounded for the same to the satisfaction of the creditor, the court might, on the appearance of the debtor, or if he should not have appeared having no lawful impediment allowed by the court, have adjudged him bankrupt (*a*). The Act of 1849 contained a further provision, that on a proper affidavit of debt being made by any creditor, stating, amongst other things, the delivery to the trader personally, or to some adult inmate at his usual or last known place of abode or business, of written particulars of his demand, with notice requiring immediate payment, such trader might be summoned to appear before the bankrupt court either to admit the demand, or to swear that he verily believed that he had a good defence to such demand or to some part of it. And in such case the court was empowered to require the trader to enter into a bond with two sureties to pay such sum as should be recovered, together with such costs as should be given in any action which should have been or should be brought for the recovery of such demand or any part thereof (*b*). And if he admitted the demand, and did not satisfy the creditor within seven days next after the filing of such admission, he committed an act of bankruptcy on the eighth day after the filing of such admission, provided a petition for adjudication of bankruptcy were filed against him within two calendar months from the filing of the creditor's affidavit (*c*). There were

Filing affidavit of debt.

Admission of debt and non-payment.

(*z*) Stat. 24 & 25 Vict. c. 134, s. 77.

(*a*) Sect. 83.

(*b*) Stat. 12 & 13 Vict. c. 106, ss. 78, 79.

(*c*) Sect. 81.

other attendant provisions which it is now unnecessary to state, as the only other acts of bankruptcy beyond the three above referred to (*d*) are stated by the Bankruptcy Act, 1869 (*e*), in the following terms:—

(4.) That the debtor has filed in the prescribed manner in the court a declaration admitting his inability to pay his debts:

(5.) That execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than fifty pounds has in the case of a trader been levied by seizure and sale of his goods:

(6.) That the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due, of an amount of not less than fifty pounds, and the debtor being a trader has for the space of seven days, or not being a trader has for the space of three weeks, succeeding the service of such summons, neglected to pay such sum, or to secure or compound for the same.

But no person shall be adjudged a bankrupt on any of the above grounds unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication (*f*); moreover, the debt of the petitioning creditor must be a liquidated sum due at law or in equity (*g*), and must not be a secured debt, unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors in the event of the debtor being adjudicated a bankrupt,

Secured creditor.

(*d*) *Ante*, p. 142.

(*e*) Stat. 32 & 33 Vict. c. 71, s. 6.

(*f*) Twelve months was the period formerly allowed. See *Allen* v. *Bonnett*, Law Rep., 5 Ch. Ap. 577; *Ex parte Wier*, Law Rep., 6 Ch. Ap. 875.

(*g*) *Ex parte Hayward*, Law Rep., 6 Ch. Ap. 546.

or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, but he shall, on an application being made by the trustee within the prescribed time after the date of adjudication, give up his security to such trustee for the benefit of the creditors upon payment of such estimated value.

The Absconding Debtors Act, 1870.

The Absconding Debtors Act, 1870 (*h*), empowers the Court of Bankruptcy to arrest any debtor, who has been served with a debtor's summons, if there be probable reason for believing that he is about to go abroad with a view of avoiding payment of the debt, or of avoiding service of a petition of bankruptcy, or of avoiding appearing to such petition, or of avoiding examination in respect of his affairs, or otherwise avoiding, delaying or embarrassing proceedings in bankruptcy.

Petition for adjudication in bankruptcy.

When an act of bankruptcy has been committed, any single creditor, or two or more creditors, if the debt due to such single creditor, or the aggregate amount of debts due to such several creditors, from any debtor, amount to a sum of not less than fifty pounds, may present a petition to the court, praying that the debtor be adjudged a bankrupt, and alleging as the ground for such adjudication any one or more of the above-mentioned acts or defaults, included under the expression "acts of bankruptcy" (*i*). The truth of the petition is sworn to by the petitioning creditor (*k*); and at the hearing the court shall require proof of the debt of the petitioning creditor, and of the trading, if necessary,

(*h*) Stat. 33 & 34 Vict. c. 76.
(*i*) Stat. 32 & 33 Vict. c. 71, s. 6; *ante*, pp. 142, 145.
(*k*) Stat. 32 & 33 Vict. c. 71, s. 80, par. (1).

and of the act of bankruptcy, and if satisfied with such proof shall adjudge the debtor to be a bankrupt (*l*).

Commission of bankruptcy.

Formerly a commission of bankruptcy under the great seal issued in every case, whereby certain persons were appointed commissioners for the purpose of directing that particular bankruptcy (*m*). Subsequently a Court of Bankruptcy was erected in London, and certain fixed commissioners appointed, by any one of whom the duties of a commissioner were to be performed in all cases of bankruptcies in London (*n*). The creditor presented a formal petition to the Lord Chancellor, whereupon a fiat in bankruptcy issued, whereby the creditor was authorized to prosecute his complaint against the trader in the Court of Bankruptcy, or before one of the commissioners of that court (*o*). And more recently fixed commissioners were appointed throughout the country, each of whom had a separate district, and formed a court of record (*p*). But by the Bankruptcy Act, 1861, jurisdiction in bankruptcy was vested in the judges of the County Courts, except those of the metropolis (*q*). And provision was made for the reduction of the number of the London commissioners to three (*r*). And her Majesty was empowered, upon any vacancy in the office of country commissioner, to transfer, by order in Council, the jurisdiction of such commissioner to any of the judges of the County Courts within the district (*s*). But the Bankruptcy Act, 1869, has now abolished all the London commissioners and also all the country district courts, and has provided for the appointment of a chief judge in the London Bankruptcy

Court of Bankruptcy.

Fiat in bankruptcy.

(*l*) Stat. 32 & 33 Vict. c. 71, s. 8.

(*m*) Stat. 13 Eliz. c. 7, s. 2; 6 Geo. IV. c. 16, s. 12.

(*n*) Stat. 1 & 2 Will. IV. c. 56.

(*o*) Sect. 12.

(*p*) Stats. 5 & 6 Vict. c. 122, s. 59 *et seq.*; 12 & 13 Vict. c. 106, ss. 6—11.

(*q*) Stat. 24 & 25 Vict. c. 134, s. 3.

(*r*) Sect. 2.

(*s*) Sect. 4.

Court, and for the transfer of all the country business to the County Courts (*t*); subject to powers reserved to the Lord Chancellor to exclude any of them from jurisdiction in bankruptcy (*u*).

The adjudication.

The fiat was abolished by the Act of 1849; and the debt, the trading, and the act of bankruptcy having been proved, the trader is adjudged a bankrupt by the court to which the petition is presented (*x*). And the Bankruptcy Act, 1869, provides that a copy of an order of the court adjudging the debtor to be bankrupt shall be published in the London Gazette, and be advertised locally in such manner (if any) as may be prescribed, and the date of such order shall be the date of the adjudication for the purposes of the act, and the production of a copy of the Gazette containing such order as aforesaid shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt and of the date of the adjudication (*y*).

Advertisement of order of adjudication.

Assignees.

Previously to the Bankruptcy Act, 1869, the estate of the bankrupt vested in his assignees. These were in modern times of two kinds; official assignees and creditors' assignees. The official assignees were officers of the Bankruptcy Court, one of whom was appointed by the court to act for every bankruptcy. His duty formerly was to receive all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of the sale of the estate and effects, real and personal, of the bankrupt; and after the appointment of the creditors' assignees, he continued to be an assignee jointly with them. But the Bankruptcy Act, 1861, provided that, at the appointment of the creditors' assignee, all the estate, both real and personal, of the

Official assignee.

(*t*) Stat. 32 & 33 Vict. c. 71, ss. 59, 60, 128, 130.
(*u*) Sect. 79.
(*x*) Sect. 8.
(*y*) Sect. 10.

bankrupt should be devested out of the official assignee and vested in the creditors' assignee (*z*). The management of the estate was then vested in the creditors' assignee; except as to debts due to the estate not exceeding £10, as to which the official assignee was to be deemed the sole assignee of the estate, notwithstanding the appointment of a creditors' assignee (*a*). But the Bankruptcy Act, 1869, has abolished the official assignees, and has substituted for the creditors' assignees a trustee to be appointed at a general meeting of the creditors. And the act provides (*b*) that the creditors assembled at such meeting shall and may do as follows:—

Creditors' assignee.

Trustee.

(1.) They shall, by resolution, appoint some fit person, whether a creditor or not, to fill the office of *trustee* of the property of the bankrupt, at such remuneration as they may from time to time determine, if any; or they may resolve to leave his appointment to the committee of inspection thereinafter mentioned:

Trustee.

(2.) They shall, when they appoint a trustee, by resolution declare what security is to be given, and to whom, by the person so appointed, before he enters on the office of trustee:

(3.) They shall, by resolution, appoint some other fit persons, not exceeding five in number, and being creditors qualified to vote at such first meeting of creditors as is in the act mentioned, or authorized in the prescribed form by creditors so qualified to vote, to form a *committee of inspection* for the purpose of superintending the administration by the trustee of the bankrupt's property:

Committee of inspection.

(4.) They may, by resolution, give directions as to

(*z*) Stat. 24 & 25 Vict. c. 134, s. 117.

(*a*) Sect. 128.

(*b*) Stat. 32 & 33 Vict. c. 71, s. 14.

the manner in which the property is to be administered by the trustee, and it shall be the duty of the trustee to conform to such directions, unless the court for some just cause otherwise orders.

Power of trustee to deal with property.

Subject to the provisions of the act, the trustee has power to do the following things:—

(1.) To receive and decide upon proof of debts in the prescribed manner, and for such purpose to administer oaths:

(2.) To carry on the business of the bankrupt so far as may be necessary for the beneficial winding-up of the same.

(3.) To bring or defend any action, suit, or other legal proceeding relating to the property of the bankrupt:

(4.) To deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with the same; and the sections fifty-six to seventy-three (both inclusive) of the act of the session of the third and fourth years of the reign of King William the Fourth (chapter seventy-four), "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," shall extend and apply to proceedings in bankruptcy under the act as if those sections were re-enacted and made applicable in terms to such proceedings:

(5.) To exercise any powers the capacity to exercise which is vested in him under the act, and to execute all powers of attorney, deeds, and other instruments expedient or necessary for the purpose of carrying into effect the provisions of the act:

(6.) To sell all the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction or private contract, with power, if he thinks fit, to transfer the whole thereof to any person or company, or to sell the same in parcels:

(7.) To give receipts for any money received by him, which receipt shall effectually discharge the person paying such monies from all responsibility in respect of the application thereof:

(8.) To prove, rank, claim, and draw a dividend in the matter of the bankruptcy or sequestration of any debtor of the bankrupt (*c*).

Power to allow bankrupt to manage property.

The trustee may appoint the bankrupt himself to superintend the management of the property or of any part thereof, or to carry on the trade of the bankrupt (if any) for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the creditors direct (*d*).

Powers of trustee with sanction of committee.

The trustee may, with the sanction of the committee of inspection, do all or any of the following things:—

(1.) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts:

(2.) Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any debtor or person who may have incurred any liability to the bankrupt, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon:

(*c*) Stat. 32 & 33 Vict. c. 71, s. 25. (*d*) Sect. 26.

(3.) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the bankruptcy:

(4.) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person:

(5.) Divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot advantageously be realized by sale.

The sanction given for the purposes of this section may be a general permission to do all or any of the above-mentioned things, or a permission to do all or any of them in any specified case or cases (*e*).

Power of trustee to accept composition or general scheme of arrangement.

The trustee may, with the sanction of a special resolution of the creditors assembled at any meeting, of which notice has been given specifying the object of such meeting, accept any composition offered by the bankrupt, or assent to any general scheme of settlement of the affairs of the bankrupt, upon such terms as may be thought expedient, and with or without a condition that the order of adjudication is to be annulled, subject nevertheless to the approval of the court, to be testified by the judge of the court signing the instrument containing the terms of such composition or scheme, or embodying such terms in an order of the court (*f*).

Trustee, if a solicitor, may be paid for services.

A trustee shall not, without the consent of the committee of inspection, employ a solicitor or other agent,

(*e*) Stat. 32 & 33 Vict. c. 71, s. 27. (*f*) Sect. 28.

but where the trustee is himself a solicitor he may contract to be paid a certain sum by way of per-centage or otherwise as a remuneration for his services as trustee, including all professional services, and any such contract shall, notwithstanding any law to the contrary, be lawful (*g*).

Proceeds of sale and seizure of goods.

Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding fifty pounds and sold, the sheriff, or, in the case of a sale under the direction of the county court, the high bailiff or other officer of the county court, shall retain the proceeds of such sale in his hands for a period of *fourteen* days; and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader (*h*), shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him (*i*).

Proof of debts.

As the bankrupt was discharged from such claims only as had been or might have been proved under the bankruptcy, elaborate provisions were made by the former acts for the proof of as many demands as possible. As these provisions have now been repealed, it

(*g*) Sect. 29.

(*h*) Notice of a petition for liquidation under sect. 125, *post*, has an equivalent effect; *Ex parte Keys, In re Skinner*, Law Rep., 10 Eq. 432, C. J. B.

(*i*) Stat. 32 & 33 Vict. c. 71, s. 87.

is unnecessary to state them. The present act provides as follows:—"Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy; and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice. Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy. An estimate shall be made according to the rules of the court for the time being in force, so far as the same may be applicable, and where they are not applicable at the discretion of the trustee, of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value. Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the court, and the court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and upon such order being made such debt or liability shall, for the purposes of this act, be deemed to be a debt not provable in bankruptcy, but if the court think that the value of the debt or liability is capable of being fairly estimated it may direct such value to be assessed with the consent of all the parties interested before the court itself without the intervention of a jury, or if such parties do not consent, by a jury, either before the court itself or some other competent court, and may

Description of debts now provable in bankruptcy.

Estimate of contingent liabilities.

give all necessary directions for such purpose, and the amount of such value when assessed shall be provable as a debt under the bankruptcy. "Liability" shall for the purposes of this act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy; and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated, as respects time present or future, certain or dependent on any one contingency or on two or more contingencies, as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion"(*k*).

Definition of liability.

The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for *one year's rent* accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the overplus due for which the distress may not have been available (*l*).

Power for landlord to distrain for one year's rent.

When any rent or other payment falls due at stated periods, and the order of adjudication is made at any

Proof in case of rent and periodical payment.

(*k*) Stat. 32 & 33 Vict. c. 71, s. 31; *Ex parte Waters*, L. J. M., 21 W. R. 554.

(*l*) Sect. 34.

time other than one of such periods, the person entitled to such rent or payment may prove for a proportionate part thereof up to the day of the adjudication, as if such rent or payment grew due from day to day (*m*).

Interest on debts.

Interest on any debt provable in bankruptcy may be allowed by the trustee under the same circumstances in which interest would have been allowable by a jury if an action had been brought for such debt (*n*).

Proof in respect of distinct contracts.

If any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof, in respect of such contracts, against the properties respectively liable upon such contracts (*o*).

Allowance to bankrupt for maintenance or service.

The trustee, with the consent of the creditors, testified by a resolution passed in general meeting, may from time to time, during the continuance of the bankruptcy, make such allowance as may be approved by the creditors to the bankrupt out of his property for the support of the bankrupt and his family, or in consideration of his services if he is engaged in winding up his estate (*p*.)

Set-off.

Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party

(*m*) Stat. 32 & 33 Vict. c. 71, s. 35.
(*n*) Sect. 36.
(*o*) Sect. 37.
(*p*) Sect. 38.

shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had, at the time of giving credit to the bankrupt, notice of an act of bankruptcy committed by such bankrupt and available against him for adjudication (*q*).

Provision as to secured creditor.

A creditor holding a specific security on the property of the bankrupt, or on any part thereof, may, on giving up his security, prove for his whole debt. He shall also be entitled to a dividend in respect of the balance due to him after realizing or giving credit for the value of his security, in manner and at the time prescribed. A creditor holding such security as aforesaid, and not complying with the foregoing conditions, shall be excluded from all share in any dividend (*r*).

The title of the assignees related back to the act of bankruptcy.

As the bankruptcy of a person consists in his committing an act of bankruptcy, and not in his being adjudged bankrupt, his assignees, when appointed, became entitled to all the real and personal estate of which he was possessed at the hour when he committed the act (*s*); though the legal estate in the bankrupt's lands remained vested in him until conveyed to the assignees by their appointment (*t*). The title of the assignees, it was said, related back to the act of bankruptcy. The consequences of this rule were formerly very serious, as many *bonâ fide* transactions were overturned in consequence of an act of bankruptcy having been committed by one of the

(*q*) Sect. 39.

(*r*) Sect. 40.

(*s*) *Thomas* v. *Desanges*, 2 Bar. & Ald. 586; *Rouch* v. *Great Western Railway Company*, 1 Q. B. 51.

(*t*) *Doe* d. *Esdaile* v. *Mitchell*, 2 Man. & Selw. 446.

Former enactment.

parties without the knowledge of the other. But after several partial remedies (*u*), it was enacted by the Act of 1849, that all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf, before the filing of a petition for adjudication of bankruptcy, and all payments really and *bonâ fide* made to any bankrupt before the filing of such petition, and all conveyances by any bankrupt *bonâ fide* made and executed before the filing of such petition, and all contracts, dealings and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt *bonâ fide* executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt *bonâ fide* executed and levied by seizure *and sale* before the filing of such petition, should be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment should have issued, had not at the time of such payment, conveyance, contract, dealing or transaction, or at the time of executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed (*v*). The effect of this enactment was to substitute the filing of the petition for adjudication for the *act* of bankruptcy, so far as respects all persons dealing and acting *bonâ fide* and without notice of the act of bankruptcy. On this subject the Bankruptcy Act, 1869, now contains the following provisions. It enacts that the bankruptcy shall be deemed to have relation back

Present provisions.

(*u*) Stat. 46 Geo. III. c. 135, s. 1; 49 Geo. III. c. 121, s. 2; 56 Geo. III. c. 137, s. 1; 6 Geo. IV. c. 16, ss. 81, 82, 84; 2 & 3 Vict. c. 11, s. 12; 2 & 3 Vict. c. 29.

(*v*) Stat. 12 & 13 Vict. c. 106, s. 133.

and to commence at the time of the act of bankruptcy (*x*) and then provides as follows:—

Protection of certain transactions with bankrupt.

Nothing in this act contained shall render invalid,—

(1.) Any payment made in good faith, and for value received to any bankrupt before the date of the order of adjudication by a person not having at the time of such payment notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication:

(2.) Any payment or delivery of money or goods belonging to a bankrupt, made to such bankrupt by a depositary of such money or goods before the date of the order of adjudication, who had not at the time of such payment or delivery notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication:

(3.) Any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication (*y*).

Protection of certain transactions entered into by or in relation to the property of the bankrupt.

Subject and without prejudice to the provisions of this act relating to the proceeds of the sale and seizure of goods of a trader, and to the provisions of this act avoiding certain settlements, and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions by and in rela-

(*x*) Stat. 32 & 33 Vict. c. 71, s. 11.

(*y*) Sect. 94.

tion to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy,—

(1.) Any disposition or contract with respect to the disposition of property by conveyance, transfer, charge, delivery of goods, payment of money, or otherwise howsoever made by any bankrupt in good faith and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of the making of such disposition of property notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication :

(2.) Any execution or attachment against the land of the bankrupt, executed in good faith by seizure before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being so executed by seizure notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication :

(3.) Any execution or attachment against the goods of any bankrupt, executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale notice (*z*) of any act of bankruptcy committed by the bankrupt, and available against him for adjudication (*a*).

(*z*) The notice must be clear and specific, *Evans* v. *Hallam*, Law Rep., 6 Q. B. 713.

(*a*) Stat. 32 & 33 Vict. c. 71, s. 95. But if the debt amount to fifty pounds, the seizure and sale constitute an act of bankruptcy under sect. 6, and the execution therefore is not protected; *Ex parte Keys, In re Skinner*, Law Rep., 10 Eq. 432, C. J. B.

But any settlement of property made by a trader, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within *two years* after the date of such settlement, be void as against the trustee of the bankrupt appointed under the act, and shall, if the settlor becomes bankrupt at any subsequent time within *ten years* after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee. Any covenant or contract made by a trader, in consideration of marriage, for the future settlement upon or for his wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against his trustee appointed under the act. "Settlement" shall for the purposes of this section include any conveyance or transfer of property (*b*).

Avoidance of voluntary settlements.

Avoidance of covenant for future settlement.

And every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own monies in favour of any creditor, or any person in trust for any creditor, with a

Avoidance of fraudulent preferences.

(*b*) Stat. 32 & 33 Vict. c. 71, s. 91; *Re Tonnies*, V.-C. B., 21 W. R. 559.

view of giving such creditor a preference over the other creditors (*c*), shall, if the person making, taking, paying, or suffering the same, become bankrupt within *three months* after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this act; but this section shall not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration (*d*).

All debts paid ratcably.

In the payment of dividends, no preference is given on account of the nature of the debt, whether judgment debt, bond debt, specialty or simple contract. In this respect the Court of Chancery, to which the jurisdiction in bankruptcy anciently belonged, and which now exercises an appellate jurisdiction (*e*) followed its rule that equality is equity. The crown, however, may enforce payment of the entire debt of a bankrupt crown debtor, notwithstanding the bankrupt laws (*f*). And a judgment debt, if entered up one year at least before the bankruptcy, was, by the statute for extending the remedies of creditors, a charge in equity on all the bankrupt's real estate (*g*). But this was altered with respect to all judgments entered up after the 29th July, 1864, the date of the act to amend the law relating to future judgments, statutes and recognizances (*h*). The landlord of a bankrupt might, notwithstanding an act of bankruptcy, distrain for his rent, not exceeding one year's rent accrued prior to the day of the filing of the petition for adjudication (*i*). And the present act con-

Crown debts.

Judgment.

Rent.

(*c*) The conveyance, &c., in order to fall within this section, must be made voluntarily and in contemplation of bankruptcy; *Ex parte Craven*, Law Rep., 10 Eq. 648; affirmed on appeal, Law Rep., 6 Ch. Ap. 70.

(*d*) Stat. 32 & 33 Vict. c. 71, s. 92.

(*e*) Sect. 71.

(*f*) *Anon.*, 1 Atk. 262; stat. 32 & 33 Vict. c. 71, s. 49.

(*g*) Stat. 1 & 2 Vict. c. 110, s. 13; *Ex parte Boyle*, 3 De Gex, M. & G. 515; S. C., 17 Jur. 979.

(*h*) Stat. 27 & 28 Vict. c. 112, s. 1.

(*i*) Stat. 12 & 13 Vict. c. 106,

tains, as we have seen, a provision to the same effect (*k*). The wages or salary of a clerk or servant of the bankrupt, for any time not exceeding three calendar months and not exceeding 30*l.* (*l*), and also the wages of any labourer or workman not exceeding 40*s.*, might, by the Act of 1849, be ordered by the court to be paid in full (*m*); and the present act extends this exception to *four* months' wages or salary of a clerk or servant, not exceeding *fifty* pounds, and to the wages of any labourer or workman not exceeding two months' wages (*n*). It also gives priority to rates and taxes due from the bankrupt for twelve months preceding (*o*). The bankrupt is entitled to any surplus remaining after payment of his creditors and the costs of the bankruptcy (*p*).

Wages.

Rates and taxes.

Surplus.

If the bankrupt had duly surrendered and conformed to the bankrupt law, he was formerly entitled to a certificate of conformity, by which he was discharged from all debts due by him when he became bankrupt, and from all claims and demands made provable under the bankruptcy (*q*). Formerly the certificate was required to be signed by a given proportion of the creditors (*r*); but, by the Act of 1849, the court was constituted the sole judge of any objections which might be made by any creditors against allowing the certificate; and the court might either allow the same or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case might require (*s*). The certi-

The certificate.

s. 129; *Paull* v. *Best*, 3 B. & S. 537.

(*k*) Stat. 32 & 33 Vict. c. 71, s. 34, *ante*, p. 155.

(*l*) Stat. 12 & 13 Vict. c. 106, s. 168.

(*m*) Sect. 169.

(*n*) Stat. 32 & 33 Vict. c. 71, s. 32.

(*o*) Sect. 32.

(*p*) Sect. 45.

(*q*) Stat. 12 & 13 Vict. c. 106, ss. 199, 200.

(*r*) Stat. 6 Geo. IV. c. 16, s. 122.

(*s*) Stat. 12 & 13 Vict. c. 106, s. 198.

ficates were by this act divided into three classes. If the bankruptcy had arisen from unavoidable losses and misfortunes, the bankrupt was entitled to a certificate of the first class. If the bankruptcy had not *wholly* arisen from unavoidable losses and misfortunes, he was entitled to a certificate of the second class. And if the bankruptcy had not arisen from unavoidable losses or misfortunes, he was only entitled to a certificate of the third class (*t*). But all classification of certificates was abolished by the Bankruptcy Act, 1861 (*u*); and the bankrupt, if he had properly conducted himself, became entitled to an *order of discharge*, which discharged him from all debts, claims or demands, provable under his bankruptcy (*x*). The Bankruptcy Act, 1869, now contains the following provisions with respect to the order of discharge. When a bankruptcy is closed, or at any time during its continuance, with the assent of the creditors testified by a special resolution, the bankrupt may apply to the court for an order of discharge; but such discharge shall not be granted unless it is proved to the court that one of the following conditions has been fulfilled, that is to say, either that a dividend of not less than ten shillings in the pound has been paid out of his property, or might have been paid except through the negligence or fraud of the trustee, or that a special resolution of his creditors has been passed to the effect that his bankruptcy or the failure to pay ten shillings in the pound has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that an order of discharge should be granted to him. And the court may suspend for such time as it deems to be just, or withhold altogether, the order of discharge in the circumstances following: namely, if it appears to the court on the

Order of discharge.

Present provisions.

(*t*) Stat. 12 & 13 Vict. c. 106, sched. Z.

(*u*) Stat. 24 & 25 Vict. c. 134, s. 157.

(*x*) Sect. 161.

representation of the creditors made by special resolution, of the truth of which representation the court is satisfied, or by other sufficient evidence, that the bankrupt has made default in giving up to his creditors the property which he is required by this act to give up; or that a prosecution has been commenced against him in pursuance of the provisions relating to the punishment of fraudulent debtors, contained in the "Debtors Act, 1869" (*y*), in respect of any offence alleged to have been committed by him against the said act (*z*).

Effect of order of discharge.

An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts provable under the bankruptcy, with the exception of—

(1.) Debts due to the crown:

(2.) Debts with which the bankrupt stands charged at the suit of the crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence:

and he shall not be discharged from such excepted debts unless the Commissioners of the Treasury certify in writing their consent to his being discharged therefrom. An order of discharge shall be sufficient evidence of the bankruptcy, and of the validity of the proceedings thereon; and, in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by such order, the bankrupt may plead that the cause

(*y*) Stat. 32 & 33 Vict. c. 62, *ante*, p. 110.

(*z*) Stat. 32 & 33 Vict. c. 71, s. 48.

of action occurred before his discharge, and may give the act and the special matter in evidence (*a*).

Exception of joint debtors.

The order of discharge shall not release any person who, at the date of the order of adjudication, was a partner with the bankrupt, or was jointly bound or had made any joint contract with him (*b*).

Rights of uncertificated bankrupt.

Until the bankrupt obtained his discharge all the real and personal property which might descend, revert, or be devised or bequeathed or come to him, became vested in his assignees (*c*). But an uncertificated bankrupt might maintain an action for his personal labour performed after the bankruptcy (*d*), and he might also sue in respect of contracts made with himself, and also in respect of any after-acquired property, if the assignees or creditors did not interfere (*e*). The court, however, was empowered by the Act of 1861 in certain cases of misconduct, either to refuse or suspend the order of discharge, or to grant the same subject to any conditions touching any salary, pay, emoluments, profits, wages, earnings or income, which might afterwards become due to the bankrupt, and touching his after-acquired property (*f*). The Act of 1869 has, as we have seen (*g*), substituted the trustee for the assignees; and it vests in him all the property of the bankrupt at the commencement of the bankruptcy, or which may be acquired by or devolve on him during its continuance (*h*). The act also contains the following pro-

(*a*) Stat. 32 & 33 Vict. c. 71, s. 49.

(*b*) Sect. 50.

(*c*) Stat. 12 & 13 Vict. c. 106, ss. 141, 142.

(*d*) *Silk* v. *Osborne*, 1 Esp. R. 140.

(*e*) *Webb* v. *Fox*, 7 T. Rep. 391; *Drayton* v. *Dale*, 2 Barn. & Cress. 293; *Crofton* v. *Poole*, 1 Barn. & Adol. 568.

(*f*) Stat. 24 & 25 Vict. c. 134, s. 159.

(*g*) *Ante*, p. 149.

(*h*) Stat. 32 & 33 Vict. c. 71, s. 15.

visions with regard to the status of an undischarged bankrupt. Where a person who has been made bankrupt has not obtained his discharge, then, from and after the close of his bankruptcy, the following consequences shall ensue:

Status of undischarged bankrupt.

(1.) No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy; and during that time, if he pay to his creditors such additional sum as will, with the dividend paid out of his property during the bankruptcy, make up ten shillings in the pound, he shall be entitled to an order of discharge in the same manner as if a dividend of ten shillings in the pound had originally been paid out of his property:

(2.) At the expiration of a period of three years from the close of the bankruptcy, if the debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in the meantime) shall be deemed to be a subsisting debt in the nature of a judgment debt, and, subject to the rights of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor with the sanction of the court which adjudicated such debtor a bankrupt, or of the court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in manner directed by such court, and after giving such notice and doing such acts as may be prescribed in that behalf(*i*).

(*i*) Stat. 32 & 33 Vict. c. 71, s. 54.

Evidence of proceedings in bankruptcy.

Any petition or copy of a petition in bankruptcy, any order or copy of an order made by any court having jurisdiction in bankruptcy, any certificate or copy of a certificate made by any court having jurisdiction in bankruptcy, any deed or copy of a deed of arrangement in bankruptcy, and any other instrument or copy of an instrument, affidavit or document made or used in the course of any bankruptcy proceedings, or other proceedings had under the Bankruptcy Act, 1869, may, if any such instrument as aforesaid or copy of an instrument appears to be sealed with the seal of any court having jurisdiction, or purports to be signed by any judge having jurisdiction in bankruptcy under this act, be receivable in evidence in all legal proceedings whatever (*k*).

Privilege of parliament not to prevent adjudication in bankruptcy.

If a person having privilege of parliament commits an act of bankruptcy, he may be dealt with under the Act of 1869 in like manner as if he had not such privilege (*l*).

Vacating of seat in House of Commons.

If a person, being a member of the Commons House of Parliament, is adjudged bankrupt, he shall be and remain during one year from the date of the order of adjudication incapable of sitting and voting in that House, unless within that time either the order is annulled or the creditors who prove debts under the bankruptcy are fully paid or satisfied. Provided that such debts (if any) as are disputed by the bankrupt shall be considered, for the purpose of this section, as paid or satisfied if within the time aforesaid he enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning such

(*k*) Stat. 32 & 33 Vict. c. 71, s. 107. (*l*) Sect. 120.

debts, together with any costs to be given in such proceedings (*m*).

Regulations as to liquidation by arrangement.

The following regulations are made by the Bankruptcy Act, 1869, with respect to the liquidation by arrangement of the affairs of the debtor:

(1.) A debtor unable to pay his debts may summon a general meeting of his creditors, and such meeting may, by a special resolution as defined by the act, declare that the affairs of the debtor are to be liquidated by arrangement and not in bankruptcy, and may at that or some subsequent meeting, held at an interval of not more than a week, appoint a trustee, with or without a committee of inspection.

(2.) All the provisions of the act relating to a first meeting of creditors, and to subsequent meetings of creditors in the case of a bankruptcy, including the description of creditors entitled to vote at such meetings, and the debts in respect of which they are entitled to vote, shall apply respectively to the first meeting of creditors, and to subsequent meetings of creditors, for the purposes of this section, subject to the following modifications:

(*a.*) That every such meeting shall be presided over by such chairman as the meeting may elect; and

(*b.*) That no creditor shall be entitled to vote until he has proved by a statutory declaration a debt provable in bankruptcy to be due to him, and the amount of such debt, with any prescribed particulars; and any person wilfully making a false declaration in relation to such debt shall be guilty of a misdemeanor.

(*m*) Stat. 32 & 33 Vict. c. 71, s. 121.

(3.) The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the meeting at which the special resolution is passed, and shall answer any inquiries made of him, and he, or if he is so prevented from being at such meeting some one on his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom his debts are due.

(4.) The special resolution, together with the statement of the assets and debts of the debtor, and the name of the trustee appointed, and of the members, if any, of the committee of inspection, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section; but if satisfied that it was so passed, and that a trustee has been appointed with or without a committee of inspection, he shall forthwith register the resolution and the statement of the assets and debts of the debtor, and such resolution and statement shall be open for inspection on the prescribed conditions, and the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee (*n*).

(5.) All such property of the debtor as would, if he were made bankrupt, be divisible amongst his creditors shall, from and after the date of the appointment of a trustee, vest in such trustee under a liquidation by arrangement, and be divisible amongst the creditors, and all such

(*n*) But the title of the trustee to the debtor's property relates back to the filing of the petition for liquidation by arrangement; *Ex parte Duignan, In re Bissell*, 40 L. J., Bank. 33; *Ex parte Todhunter, In re Norton*, Law Rep., 10 Eq. 425.

settlements, conveyances, transfers, charges, payments, obligations and proceedings as would be void against the trustee in the case of a bankruptcy shall be void against the trustee in the case of liquidation by arrangement.

(6.) The certificate of the registrar in respect of the appointment of any trustee in the case of a liquidation by arrangement shall be of the same effect as a certificate of the court to the like effect in the case of a bankruptcy.

(7.) The trustee under a liquidation shall have the same powers and perform the same duties, as a trustee under a bankruptcy, and the property of the debtor shall be distributed in the same manner as in a bankruptcy; and with the modification hereinafter mentioned all the provisions of the act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word "bankrupt" included a debtor whose affairs are under liquidation, and the word "bankruptcy" included liquidation by arrangement; and in construing such provisions the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the service of such petition or an order of adjudication in bankruptcy.

(8.) The creditors at their first or any general meeting may prescribe the bank into which the trustee is to pay any monies received by him, and the sum which he may retain in his hands.

(9.) The provisions of the act with respect to the close of the bankruptcy, discharge of a bank-

rupt, to the release of the trustee, and to the audit of accounts by the comptroller, shall not apply in the case of a debtor whose affairs are under liquidation by arrangement; but the close of the liquidation may be fixed, and the discharge of the debtor and the release of the trustee may be granted by a special resolution of the creditors in general meeting, and the accounts may be audited in pursuance of such resolution, at such time and in such manner and upon such terms and conditions as the creditors think fit.

(10.) The trustee shall report to the registrar the discharge of the debtor, and a certificate of such discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt under the act.

(11.) Rules of court may be made in relation to proceedings on the occasion of liquidation by arrangement in the same manner and to the same extent and of the same authority as in respect of proceedings in bankruptcy.

(12.) If it appear to the court on satisfactory evidence that the liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly (*o*).

(13.) Where no committee of inspection is appointed the trustee may act on his own discretion in

(*o*) Filing a petition for liquidation by arrangement is an act of bankruptcy; *Ex parte Duignan, In re Bissell*, Law Rep., 11 Eq. 604; affirmed, Law Rep., 6 Ch. Ap. 605.

cases where he would otherwise have been bound to refer to such committee.

(14.) In calculating a majority on a special resolution for the purposes of this section, creditors whose debts amount to sums not exceeding ten pounds shall be reckoned in the majority in value, but not in the majority in number (*p*).

(*p*) Stat. 32 & 33 Vict. c. 71, s. 125.

CHAPTER V.

OF BANKRUPTCY OF NON-TRADERS.

Before the Bankruptcy Act, 1861, a person not in trade could not be made a bankrupt. He might, however, have become insolvent. Insolvency, strictly speaking, means a general inability to meet pecuniary engagements (*a*). But the term was very commonly and conveniently applied to the means of getting rid of such engagements afforded by certain acts of parliament passed for the relief of insolvent debtors.

Stat. 1 & 2 Vict. c. 110.

The principal act for the relief of insolvent debtors in England was the statute 1 & 2 Vict. c. 110, the former sections of which were, however, occupied in abolishing arrest on mesne process in civil actions, and in extending the remedies of judgment creditors against the property of their debtors. So far as the act related to insolvent debtors, it was for the most part a reprint, with some important additions, of a previous statute for the same purpose (*b*), by which the laws then existing on the subject were amended and consolidated. The relief afforded to the debtor was his discharge from prison; and the act accordingly only applied to persons in actual custody within the walls of a prison in England. Any such person in custody upon any process whatsoever, for or by reason of any debt, damages, costs, sum or sums of money, or in consequence of contempt of any court whatsoever for non-payment of money or costs, taxed or untaxed, might at any time within the

Discharge from prison.

(*a*) *Biddlecombe* v. *Bond*, 4 Adol. & Ell. 332.

(*b*) Stat. 7 Geo. IV. c. 57, continued and amended by stat. 11 Geo. IV. & 1 Will. IV. c. 38.

space of fourteen days next after the commencement of his actual custody, or afterwards by permission of the court, apply by petition to the Court for the Relief of Insolvent Debtors for his discharge from such custody, according to the provisions of the act (*c*). In the country the petition was referred for hearing to the county court of the district within which the insolvent was in custody (*d*). The insolvent himself was formerly the only person who could put the machinery of the act in motion; but afterwards the creditor at whose suit the prisoner was committed to prison or charged in execution might, if not satisfied within twenty-one days next after such prisoner should have been so committed or charged in execution, himself petition the court for his share of the relief (*e*), which consisted in the real and personal estate and effects of the prisoner being vested in the provisional assignee of the court for the benefit of his creditors.

Vesting order.

On the filing of the petition either of the debtor or of the creditor, a vesting order, as it was termed, was made by the court. By this order all the real and personal estate and effects of the prisoner, both within this realm and abroad (except his wearing apparel, bedding and other such necessaries of himself and his family, and his working tools and implements, not exceeding in the whole the value of twenty pounds), and all the future estate to which he might become entitled until his final discharge, were vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England (*f*). The court might subsequently

Assignees.

(*c*) Stat. 1 & 2 Vict. c. 110, s. 35.

(*d*) Stat. 10 & 11 Vict. c. 102, s. 10.

(*e*) Sect. 36. In this case, however, the Insolvent Court had no adequate means of compelling the prisoner to file a schedule of his property; *Hollis* v. *Bryant*, 12 Sim. 492, 501.

(*f*) Stat. 1 & 2 Vict. c. 110, s. 37; *Ford* v. *Dabbs*, 5 Man. & Gr. 309.

have appointed any proper person or persons to be assignees of such estate and effects, in whom the same accordingly vested on the acceptance of the appointment being signified by him or them to the court (*g*). The estate and effects of the prisoner were then sold and converted into money by the assignees in the manner directed by the act (*h*). And the court had power to order that any property of the prisoner might be mortgaged, instead of being sold, if it should appear to the court that his debts could be discharged by such means (*i*). If the insolvent were a beneficed clergyman, the assignees might have obtained a sequestration of the profits of the benefice for the payment of his debts (*k*). And if the insolvent were or had been an officer under government, or in the service of the East India Company, a portion of his pay, half-pay, salary, emoluments or pension might, with the written consent of the chief officer of the department to which he belonged or had belonged, be ordered to be paid to the assignees (*l*). The produce of the insolvent's estate was then divided by the assignees rateably amongst the creditors (*m*). And if any prisoner should before or after his imprisonment, being in insolvent circumstances, have voluntarily conveyed, charged or made over any of his estate to or in trust for any creditor or creditors, every such transaction was declared to be fraudulent and void as against the assignees, if made within three months before the commencement of the party's imprisonment, or with the view or intention on his part of petitioning the court for his discharge under the act (*n*).

Beneficed clergyman.

Officer.

Voluntary preference.

(*g*) Stat. 1 & 2 Vict. c. 110, s. 45.

(*h*) Sect. 47. See *Wright* v. *Maunder*, 4 Beav. 512.

(*i*) Sect. 48.

(*k*) Sect. 55. See stat. 12 & 13 Vict. c. 67.

(*l*) Stat. 1 & 2 Vict. c. 110, s. 56.

(*m*) Sect. 62.

(*n*) Sect. 59. See *Harris* v. *Lloyd*, 6 Beav. 426; *Jackson* v. *Thompson*, 2 Q. B. 887; 3 Man. & Gr. 621.

Within fourteen days next after the making of the vesting order, or within such further time as the court thought reasonable, a schedule was required to be delivered into the court, signed by the prisoner, containing a full description of his name, trade or profession, place of abode, debts and property of every description (*o*). Immediately after the filing of this schedule, a time and place were appointed by the court for the prisoner to be brought up to be dealt with according to the act (*p*), of which due notice was given to the creditors (*q*). His schedule was then examined into on oath by the court; and any creditor might oppose his discharge, and for that purpose might put such questions to the prisoner and examine such witnesses as the court thought fit (*r*). After such examination the court was then empowered, upon the prisoner swearing to the truth of his schedule, and executing the warrant of attorney to be mentioned afterwards, to adjudge that such prisoner should be discharged from custody, and entitled to the benefit of the act as to the several debts and sums of money mentioned in the schedule, due, or claimed to be due, at the time of making the vesting order, from the prisoner to the persons named in his schedule, or for which such persons should have given him credit before the time of making such vesting order, and which were not then payable, and as to the claims of all other persons, not known to the prisoner at the time of the adjudication, who might have been indorsees or holders of any negotiable security set forth in the schedule (*s*). The discharge might have been, in the discretion of the court, either immediate, or might have been postponed for six months (*t*); and in certain cases of flagrant misconduct it might have

The schedule.

Discharge from custody.

(*o*) Stat. 1 & 2 Vict. c. 110; s. 69.
(*p*) Sect. 70.
(*q*) Sect. 71.
(*r*) Sect. 72.
(*s*) Sect. 75; *Leonard* v. *Baker*, 15 Mee. & Wels. 202.
(*t*) Sect. 76.

been postponed for any period not exceeding three years (*u*).

Effect of discharge.

The insolvent being thus discharged was free from any future imprisonment, and his property was also free from execution at the suit of his creditors, for the debts mentioned in the schedule (*x*). And the costs of actions and suits (*y*), and the claims of annuity creditors (*z*), might have been comprised in such discharge. The discharge, however, was not, like that of bankruptcy, final and complete; for before any adjudication was made, the prisoner was required to execute a warrant of attorney, authorizing the entering up of a judgment against him in one of the superior courts at Westminster, in the name of the assignee or assignees, for the amount of the prisoner's unsatisfied debts as stated in the schedule. And if at any time it should have appeared to the satisfaction of the court that the prisoner was of ability to pay such debts, or any part thereof, or that he was dead leaving assets for that purpose, the court might have permitted execution to be taken out upon the judgment for such sum as it might have ordered, such sum to be distributed rateably among the creditors (*a*).

Warrant of attorney executed by prisoner.

Insolvency under stat. 5 & 6 Vict. c. 116.

Under certain circumstances, an insolvent might, by other acts of parliament, have obtained as complete a discharge from his debts as if he had become bankrupt (*b*). The acts, however, only applied to such persons as had become indebted without any fraud, or

(*u*) Stat. 1 & 2 Vict. c. 110, ss. 77, 78.

(*x*) Sects. 90, 91.

(*y*) Sect. 79.

(*z*) Sect. 80. See *Bennett* v. *Burton*, 12 Ad. & Ell. 657.

(*a*) Sect. 87. See also sects. 88 and 89. See *Hawkes* v. *Hallilwell*, 2 Sma. & Giff. 498.

(*b*) Stats. 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 10 & 11 Vict. c. 102.

gross or culpable negligence (*c*). Any person so indebted, not being a trader within the bankrupt laws, or being such trader, but owing debts amounting in the whole to less than 300*l*., might, whether he should have already been in prison or not (*d*), have applied for the protection of his person from process, on making a full disclosure and surrender of all his estate and effects for the payment of his debts. The application was made to the Court for the Relief of Insolvent Debtors (*e*). But if the petitioner should not have resided for the last six calendar months within twenty miles of London, but should have resided for that time within the district of a County Court, application must then have been made to such County Court (*f*). The whole estate and effects of the insolvent were then vested in the provisional assignee of the Insolvent Court, or in the clerk of the County Court, as the case might be, for the benefit of all the creditors rateably (*g*). But the wearing apparel, &c. of the petitioner and his family, not exceeding the value of 20*l*., might have been excepted, as in the other Insolvent Act, provided such excepted articles, and the values thereof, were fully and truly described (*h*). With the exception of the warrant of attorney given by the prisoner under the other Insolvent Act, the provisions of these acts were generally similar to those of that act. The filing of every petition under these acts was required to be registered in the registry for judgments of the County Courts (*i*).

In the reign of Geo. III. an act was passed for the discharge of debtors in execution upon any judgment

Stat. 48 Geo. 3, c. 123.

(*c*) Stats. 5 & 6 Vict. c. 116, s. 4; 7 & 8 Vict. c. 96, s. 24.

(*d*) Stats. 7 & 8 Vict. c. 96, s. 6; 10 & 11 Vict. c. 102, s. 7.

(*e*) Stat. 10 & 11 Vict. c. 102, ss. 6, 8.

(*f*) Ibid. s. 6.

(*g*) Stats. 5 & 6 Vict. c. 116, s. 7; 10 & 11 Vict. c. 102, s. 5.

(*h*) Stat. 7 & 8 Vict. c. 96, s. 9.

(*i*) Stat. 17 & 18 Vict. c. 16, s. 2. See *ante*, p. 111.

Stat. 7 & 8 Vict. c. 70.

for any debt or damages not exceeding 20*l.*, exclusive of costs (*k*). But this act is now repealed (*l*). An act was also passed in the early part of the present reign for facilitating arrangements between debtors and creditors (*m*), which applied only to such debtors as were not traders within the bankrupt laws. But this act also has been repealed (*n*).

The Bankruptcy Act, 1861.

The Bankruptcy Act, 1861 (*o*), made a complete change in the law with respect to the insolvency of persons not in trade. That act repealed all the above-mentioned acts for the relief of insolvent debtors, and abolished the court for their relief (*p*). All persons whether traders or not became subject to the bankrupt law (*q*); but no person was to be adjudged a bankrupt, except in respect of some one of the acts of bankruptcy described in the act as applicable to a non-trader (*r*).

Pauper and lunatic prisoners.

The Bankruptcy Act, 1861, also contained provisions for the discharge from prison of pauper and lunatic prisoners for debt. These provisions applied both to traders and non-traders (*s*).

Pay, half-pay, &c.

This act also contained provisions for the payment of a portion of the pay, half-pay, salary, emolument or pension of any bankrupt to his assignees if sanctioned by the chief officer of the department to which he might have belonged (*t*);

Sequestration.

also for the sequestration of the profits of the benefice of any bankrupt who was a beneficed clergyman (*u*).

(*k*) Stat. 48 Geo. III. c. 123. See *Tolson* v. *Dykes*, 1 Phillips, 439.

(*l*) Stat. 32 & 33 Vict. c. 83.

(*m*) Stat. 7 & 8 Vict. c. 70.

(*n*) Stat. 32 & 33 Vict. c. 83.

(*o*) Stat. 24 & 25 Vict. c. 134.

(*p*) Sects. 19—27.

(*q*) Sect. 69. Peers and members of Parliament were included; *Duke of Newcastle* v. *Morris*, Law Rep., 4 H. of L. Cas. 661.

(*r*) Sect. 69.

(*s*) Sects. 98—107; *Bramwell* v. *Eglinton*, Q. B., 10 Jur., N. S. 583.

(*t*) Stat. 24 & 25 Vict. c. 134, s. 134.

(*u*) Sect. 135; *Hopkins* v. *Clarke*, 4 Best & Smith, 836; affirmed, 5 B. & S. 753.

But the Bankruptcy Act, 1861, has now been repealed (*x*), and its place is supplied by the Bankruptcy Act, 1869 (*y*). Imprisonment for debt has also been abolished (*z*). Under the present act a non-trader is still liable to be made a bankrupt, and the acts of bankruptcy have already been enumerated (*a*). Bankruptcy Act, 1869.

Where a bankrupt is a beneficed clergyman, the trustee (*b*) may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of *levari facias* (*c*) founded on a judgment against the bankrupt, and shall have priority over any other sequestration issued after the commencement of the bankruptcy, except a sequestration issued before the date of the order of adjudication by or on behalf of a person who at the time of the issue thereof had not notice of an act of bankruptcy committed by the bankrupt, and available against him for adjudication; but the sequestrator shall allow out of the profits of the benefice to the bankrupt, while he performs the duties of the parish or place, such an annual sum, payable quarterly, as the bishop of the diocese in which the benefice is situate directs; and the bishop may appoint to the bankrupt such or the like stipend as he might by law have appointed to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident (*d*). Sequestration of ecclesiastical benefice.

Where a bankrupt is or has been an officer of the army or navy, or an officer or clerk or otherwise em- Appropriation of portion of pay of officers to creditors.

(*x*) Stat. 32 & 33 Vict. c. 83.
(*y*) Stat. 32 & 33 Vict. c. 71.
(*z*) Stat. 32 & 33 Vict. c. 62, *ante*, p. 110.
(*a*) *Ante*, pp. 142, 145.
(*b*) *Ante*, p. 149.
(*c*) *Ante*, p. 54.
(*d*) Stat. 32 & 33 Vict. c. 71, s. 88.

ployed or engaged in the civil service of the Crown, or is in the enjoyment of any pension or compensation granted by the Treasury, the trustee during the bankruptcy, and the registrar after the close of the bankruptcy, shall receive for distribution amongst the creditors so much of the bankrupt's pay, half-pay, salary, emolument, or pension as the court, upon the application of the trustee, thinks just and reasonable, to be paid in such manner and at such times as the court, with the consent in writing of the chief officer of the department under which the pay, half-pay, salary, emolument, pension, or compensation is enjoyed, directs (*e*).

Appropriation of portion of salary to creditors.

Where a bankrupt is in the receipt of a salary or income other than as aforesaid, the court upon the application of the trustee shall from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee during the bankruptcy, and to the registrar if necessary after the close of the bankruptcy, to be applied by him in such manner as the court may direct (*f*).

Bankrupt peers.

By the Bankruptcy Disqualification Act, 1871 (*g*), bankrupt peers are disqualified from sitting or voting in the House of Lords.

After the adjudication of bankruptcy has taken place, the proceedings are the same whether the bankrupt may have been a trader or not.

(*e*) Stat. 32 & 33 Vict. c. 71, s. 89.

(*f*) Sect. 90.

(*g*) Stat. 34 & 35 Vict. c. 50.

CHAPTER VI.

OF INSURANCE.

HAVING now considered, though very briefly, the subject of debts generally, there remain certain debts, payable on contingencies, which deserve a separate notice, namely, debts arising under contracts to insure effected by policies of insurance. A policy of insurance, or assurance, is the name given to an instrument by which a contract to insure is entered into; and a contract to insure is a contract either to indemnify against a loss which may arise on the happening of some event, or to pay, on the happening of some event, a sum of money to the person insured. The most usual kinds of insurance are, insurance of *lives*, insurance against loss by *fire*, and insurance of *ships* and their cargoes against the perils of the seas.

Policy of insurance.

And, first, as to life insurance. The advantages of life insurance are now so well known, that there is no occasion to dilate upon them. By payment of a small annual premium during the life insured, a sum of money may be secured at his decease, applicable to the payment of his debts, for a provision for his family, or any other purposes. But as the insurance of lives and other events, in which the person insured has no interest, is often nothing more than a mischievous kind of gaming, it is enacted, by an act of the 14th of George III., that no insurance shall be made on the life of any person, or on any other event whatsoever, wherein the person for whose use and benefit, or on whose account, such policy shall be made, shall have no interest, or by

Life insurance.

Insurances on lives in which the insured has no interest void.

way of gaming or wagering; and that every such assurance shall be null or void, to all intents and purposes whatsoever (*a*); and that it shall not be lawful to make any policy on the life of any person, or other event, without inserting in the policy the person's name interested therein, or for whose use or benefit, or on whose account, such policy is made (*b*); and that in all cases where the insured hath an interest in such life or event, no greater sum shall be recovered or received from the insurer than the amount or value of the interest of the insured in such life or other event (*c*). But this act does not extend to insurances *bonâ fide* made on ships, goods or merchandises (*d*), with respect to which provisions have been made by another act of parliament (*e*). Every person is considered to have a sufficient interest in the duration of his own life to sustain his own insurance of it; but if he should afterwards put an end to his life, or die by the sentence of the law, the insurance will be void in the hands of his executors; and no provision to the contrary contained in the policy of insurance will be of any avail (*f*). The assignee of a person who has insured his own life is not required by the above-mentioned statute to have any interest in the life of such person, for the statute makes no mention of the assignment of policies (*g*). A creditor has an insurable interest in the life of his debtor to the extent of his debt; but if the debt should be discharged from any other source, it was formerly held that the policy would

A person may insure his own life.

A creditor has an insurable interest in the life of his debtor.

(*a*) Stat. 14 Geo. III. c. 48, s. 1; *Shilling* v. *Accidental Death Insurance Company*, 2 H. & N. 42; *Hebdon* v. *West*, 3 Best & Smith, 579.

(*b*) Sect. 2; *Hodson* v. *Observer Life Assurance Society*, 8 E. & B. 40.

(*c*) Sect. 3.

(*d*) Sect. 4.

(*e*) Stat. 19 Geo. II. c. 37, amended by stat. 27 & 28 Vict. c. 56, s. 1.

(*f*) *Amicable Assurance Society* v. *Bolland*, 4 Bligh, N. S. 194, reversing *Bolland* v. *Disney*, 3 Russ. 351; see *Clift* v. *Schwabe*, 3 C. B. 437.

(*g*) *Ashley* v. *Ashley*, 3 Sim. 149.

thenceforth be void for want of interest (*h*). This strict law was not however usually taken advantage of by the assurance offices, who generally paid the sums insured without any inquiry as to the extent of the interest of the party insured in the life on which the insurance had been effected (*i*). And by recent decisions (*k*), the doctrine that a contract for life assurance is a contract for indemnity only has been overruled; so that if the person insuring has an insurable interest at the time of effecting the policy, the subsequent loss of such interest will not render the policy void. An interest as trustee is sufficient to support a life insurance (*l*). But a father has not such an interest in the life of his son as to warrant an insurance of it for his own benefit (*m*). By the Stamp Act, 1870 (*n*), policies of life insurance are subject to stamp duties according to the table in the note (*o*).

Trustee.

Father and son.

(*h*) *Godsall* v. *Boldero*, 9 East, 72; S. C. 2 Smith's Leading Cases, 157.

(*i*) Lloyd & Goold, Cas. Temp. Sugden, 291.

(*k*) *Dalby* v. *India & London Life Assurance Company*, 15 C. B. 365; S. C. 18 Jur. 1024; *Law* v. *London Indisputable Life Policy Company*, 1 Kay & John. 223.

(*l*) *Tidswell* v. *Angerstein*, Peake, N. P. Cases, 151; *Collett* v. *Morrison*, 9 Hare, 162, 176.

(*m*) *Halford* v. *Kymer*, 10 Barn. & Cress. 724.

(*n*) Stat. 33 & 34 Vict. c. 97.

(*o*)

	s.	d.
Where the sum insured does not exceed £10	0	1
Exceeds £10, but does not exceed £25	0	3
Exceeds £25, but does not exceed £500—		
For every full sum of £50, and also for any fractional part of £50, of the amount insured	0	6
Exceeds £500, but does not exceed £1,000—		
For every full sum of £100, and also for any fractional part of £100, of the amount insured	1	0
Exceeds £1,000—		
For every full sum of £1,000, and also for any fractional part of £1,000, of the amount insured	10	0
For any payment agreed to be made upon the death of any person, only from accident or violence, or otherwise than from a natural cause, or as compensation for personal injury, or by way of indemnity against loss or damage of or to any property	0	1

Assignees of life policies may sue in their own names.

An act has recently been passed to enable assignees of policies of life assurance to sue thereon in their own names (*p*). It provides that any person or corporation entitled, by assignment or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for monies thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such monies (*q*). In any action on a policy of life assurance, a defence on equitable grounds, or a reply to such defence on similar grounds, may be respectively pleaded and relied upon in the same manner and to the same extent as in any other personal action (*r*). No assignment made after the passing of the act of a policy of life assurance shall confer on the assignee therein named, his executors, administrators or assigns, any right to sue for the amount of such policy, or the monies assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being; and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received, shall be as valid against the assignee giving such notice as if the act had not been passed (*s*). Every assurance company is required on every policy issued by them after the 30th of September, 1867, to specify their principal place or places of business at which notices of assignment may be given in pursuance of the act (*t*).

Defence or reply on equitable grounds may be pleaded.

Notice of assignment to be given.

Principal places of business to be specified on policies.

(*p*) Stat. 30 & 31 Vict. c. 144.
(*q*) Sect. 1.
(*r*) Sect. 2.
(*s*) Sect. 3.
(*t*) Sect. 4.

Notices of assignment to be acknowledged.

And every assurance company to whom notice shall have been duly given of the assignment of any policy under which they are liable, shall, upon the request in writing of any person by whom any such notice was given or signed, or of his executors or administrators, and upon payment in each case of a fee not exceeding five shillings, deliver an acknowledgment in writing under the hand of their principal officer of their receipt of such notice; and every such written acknowledgment, if signed by a person being *de jure* or *de facto* the principal officer of the company whose acknowledgment the same purports to be, shall be conclusive evidence as against the company of their having duly received the notice to which such acknowledgment relates (*u*).

A married woman may insure her own or her husband's life for her separate use.

The Married Women's Property Act, 1870 (*x*), contains the following provisions with respect to policies of life assurance. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use; and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman (*y*).

Insurance by married man for wife and children.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. And a trustee thereof may be appointed by the Court of Chancery or by the judge of the county court of the district

(*u*) Stat. 30 & 31 Vict. c. 144, s. 6.

(*x*) Stat. 33 & 34 Vict. c. 93.

(*y*) Sect. 10.

in which the insurance office is situate; and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid (*z*).

Fire insurance.

Insurance against fire is a contract to indemnify against loss by fire, and is usually renewed from year to year on payment of a premium. The person who effects such an insurance must have an interest in the property insured, and he cannot recover beyond the extent of his interest; neither can he assign his policy without the consent of the insurers (*a*). When the building insured is situate within the limits of the Metropolitan Building Acts, any person interested may procure the insurance money, in case of fire, to be laid out in repairs or rebuilding (*b*). A covenant to insure any building within such limits is therefore tantamount to a covenant to repair to the extent of such insurance, and, if entered into by a lessee in his lease, will *run with the land*, so as to be binding on the assignee of the lease (*c*). And it is now decided that, according to the true construction of the act of Geo. III. relating to this subject, the law is the same even if the building be situate beyond the above-mentioned limits (*d*). A recent enactment empowers a Court of Equity to relieve

New enactment.

(*z*) Stat. 33 & 34 Vict. c. 93, s. 10.

(*a*) *Lynch* v. *Dalzell*, 4 Bro. Parl. Cas. 431; *Saddlers' Company* v. *Badcock*, 2 Atk. 554.

(*b*) Stat. 14 Geo. III. c. 78, s. 83. This section is not repealed by stat. 18 & 19 Vict. c. 122, s. 109.

(*c*) *Vernon* v. *Smith*, 5 Barn. & Ald. 1; see Principles of the Law of Real Property, 316, 2nd ed.; 326, 3rd ed.; 331, 4th ed.; 342, 5th ed.; 359, 6th ed.; 367, 7th ed.; 383, 8th ed.; 379, 9th ed.; 382, 10th ed.

(*d*) See 4 Jur., N. S. pt. 2, p. 132; *Simpson* v. *Scottish Union, &c.*, V.-C. W., 11 W. R. 459; 1 Hem. & Mill. 618; *Re Barker*, L. C., 10 Jur., N. S. 1085.

against a forfeiture for breach of a covenant or condition to insure against fire, when no loss or damage by fire has happened, and the breach has, in the opinion of the court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court in conformity with the covenant to insure (*e*). But the same person is not to be relieved more than once, or where a forfeiture has been already waived out of court (*f*). It is also provided that the person entitled to the benefit of a covenant on the part of the lessee or mortgagor to insure against fire shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance of the premises, effected by the lessee or mortgagor, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant (*g*). There is a further enactment, which will be very beneficial to the purchasers of leasehold property, namely, that where, on a *bonâ fide* purchase of such property, the purchaser is furnished with a receipt for the last payment of rent accrued due before the completion of the purchase, and an insurance is subsisting in conformity with the lessee's covenant to insure, the purchaser shall not be liable for any breach of such covenant, committed at any time before the completion of the purchase, of which he had not notice before such completion (*h*).

Relief against forfeiture.

Lessor to have benefit of informal insurance.

Protection of purchasers.

The insurance of ships and their cargoes from the perils of the sea is a matter belonging rather to mer-

Insurance of ships.

(*e*) Stat. 22 & 23 Vict. c. 35, s. 7; *Page* v. *Bennett*, 2 Giff. 117.

(*f*) Stat. 22 & 23 Vict. c. 35, s. 6.

(*g*) Sect. 7.

(*h*) Stat. 22 & 23 Vict. c. 35, s. 8. The *ad valorem* duty on fire insurances is now repealed by stat. 32 Vict. c. 14, s. 12.

cantile law than to the department of conveyancing. In this kind of insurance, as well as in the others, an interest in the property insured must generally belong to the party effecting the insurance, if the ship be a British vessel, or the goods be laden on board any such vessel (*i*). It is now provided that whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected (*k*). Full information on the subject of marine insurance will be found in Park on Insurance, Arnould on Marine Insurance, Abbott on Shipping, and in the chapter on maritime insurance in the late J. W. Smith's admirable Compendium of Mercantile Law. Connected with maritime insurance are *bottomry* and *respondentia*. Bottomry is an agreement by which a vessel is hypothecated or pledged by the owner for the payment, in the event of her voyage terminating successfully, of money advanced to him for the necessary use of the vessel, together with interest, which interest, in consideration of the risk incurred, is generally far beyond five per cent., formerly the legal rate (*l*). Respondentia is a somewhat similar contract with respect to the cargo, except that the borrower only is responsible in the event of the safe termination of the voyage, the lender having no lien on the goods (*m*).

Assignee may sue in his own name.

Bottomry.

Respondentia.

(*i*) Stat. 19 Geo. II. c. 37, s. 1. The stamps on sea insurance are now regulated by stat. 30 Vict. c. 23, s. 3 *et seq.* And see stat. 33 & 34 Vict. c. 97, ss. 117, 118, 119.

(*k*) Stat. 31 & 32 Vict. c. 86, s. 1.

(*l*) *Simonds* v. *Hodgson*, 3 B. & Adol. 50.

(*m*) 2 Black. Com. 457; *Busk* v. *Fearon*, 4 East, 319.

CHAPTER VII.

OF ARBITRATION.

INSTEAD of the ultimate remedy of an action at law or suit in equity, recourse is sometimes had for the settlement of disputes to the more amicable expedient of arbitration. And in some transactions, especially in articles of co-partnership between traders, it is usual to stipulate that, if any dispute shall arise, it shall be referred to the determination of two indifferent persons as arbitrators, or of their umpire, who is usually and very properly required to be chosen by the arbitrators before they proceed to take the subject in question into consideration (*a*). And it is agreed that the award in writing of the arbitrators, or of their umpire in case of their disagreement, shall be binding and conclusive on all parties.

Agreements to refer to arbitration.

As the courts of law and equity have full jurisdiction on all questions arising out of agreements of any kind, it follows that they retain a jurisdiction over matters which the parties themselves have agreed should be referred to arbitration (*b*). Notwithstanding, therefore, an agreement to refer disputes to arbitration, either party may bring the matter into court (*c*). But the Common Law Procedure Act, 1854, now provides, that, whenever the parties to any deed or instrument in writing to be thereafter executed shall agree to refer

Jurisdiction of the courts over matters agreed to be referred to arbitration.

New enactment.

(*a*) See *Bates* v. *Cooke*, 9 Barn. & Cress. 407, 408.

(*b*) *Wellington* v. *Mackintosh*, 2 Atk. 569.

(*c*) *Waters* v. *Taylor*, 15 Ves. 10, 18; *Mexborough* v. *Bower*, 7 Beav. 127, 132; *Horton* v. *Sayers*, 4 H. & N. 643; *Cooke* v. *Cooke*, V.-C. W., Law Rep. 4 Eq. 77; 15 W. R. 981.

their differences to arbitration, and one of such parties shall nevertheless commence an action at law or suit in equity against the others in respect of the matters so agreed to be referred, the court may stay the proceedings on such terms as it may think fit, on being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to concur in all acts necessary for causing such matters to be decided by arbitration (*d*). And a contract may be so worded as to amount to merely an agreement to pay so much as an arbitrator may award, in which case there can be no right to sue until the award has been made (*e*).

Reference by rule of court.

The reference of disputes to arbitration appears to have been early adopted by the courts of law, with the consent of the parties to an action, in cases where the matter in dispute could be more conveniently settled in this mode. A verdict was taken for the plaintiff by consent, subject to the award of an arbitrator agreed upon by the parties, and the reference was made a rule of court. This plan is still continually adopted. The arbitrators and the parties to the reference by this means become subject to the jurisdiction of the court, which has power to set aside any award which may appear to have been given unjustly or through mistake of the law; or if the award be valid, its performance may be enforced under the penalty of imprisonment for contempt

(*d*) Stat. 17 & 18 Vict. c. 125, s. 11; *Hirsch* v. *Im Thurn*, 4 C. B., N. S. 569. See *Mason* v. *Haddan*, 6 C. B., N. S. 526; *Wheatley* v. *Westminster Brymbo Coal and Coke Company, Limited*, 2 Drew. & Sma. 347; *Cook* v. *Catchpole*, V.-C. W., 10 Jur., N. S. 1068; *Willesford* v. *Watson*, V.-C. Wickens, Law Rep., 14 Eq. 572.

(*e*) *Scott* v. *Avery*, 5 House of Lords Cases, 811; *Scott* v. *Corporation of Liverpool*, 3 De Gex & Jones, 334; *Elliott* v. *Royal Exchange Assurance Company*, Law Rep., 2 Ex. 237.

of court. And by the Common Law Procedure Act, 1854, the court has power, upon the application of either party, to order any matter in dispute, which consists wholly or in part of matters of mere account, to be referred to arbitration, upon such terms as to costs and otherwise as the court may think reasonable (*f*). In order to extend the benefits of this mode of submission to arbitration to all cases of controversies between merchants and traders or others concerning matters of account or trade or other matters, an act of parliament was passed in the reign of William the Third, intituled "An Act for determining Differences by Arbitration" (*g*). This act empowers all merchants and traders and others desiring to end by arbitration any controversy, for which there is no other remedy but by personal action or suit in equity, to agree that their submission of their suit to the award or umpirage of any person or persons shall be made a rule of any of her majesty's courts of record which the parties shall choose. And it provides, that, in case of disobedience to the arbitration or umpirage to be made pursuant to such submission, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court when he is a suitor or defendant in such court. And the process to be issued accordingly shall not be stopped or delayed in its execution by any order, rule, command or process of any other court, either of law or equity, unless it shall be made to appear on oath to such court that the arbitrators or umpire misbehave themselves, and that such award, arbitration or umpirage was procured by corruption or other undue means. It is also further provided (*h*), that any arbitration or um-

Act for determining differences by arbitration.

(*f*) Stat. 17 & 18 Vict. c. 125, ss. 3, 6, 7.

(*g*) Stat. 9 & 10 Will. III. c. 15.

(*h*) Sect. 2.

pirage procured by corruption or undue means shall be judged void, and be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage is made and published to the parties. The Court of Chancery is a court of record within the meaning of this act (*i*). And it is now provided, that every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court (*k*); but where it is provided that it shall be made a rule of one of such courts in particular, it may be made a rule of that court only (*l*). A parol submission cannot be made a rule of court, even though made in pursuance of an agreement to refer contained in a deed (*m*).

Submission to arbitration may now be made a rule of court.

Either party may revoke his submission, and thus determine the authority of the arbitrators, if the submission relate to criminal matters, which are not within the statute (*n*). The submission may also be revoked if it be not made in any action, and do not contain an agreement that it shall be made a rule of court (*o*); even though it may have been made a rule of court (*p*)

Revocation of submission.

(*i*) *Heming* v. *Swinnerton*, 2 Phil. 79.

(*k*) *Wadsworth* v. *Smith*, Law Rep., 6 Q. B. 332.

(*l*) Stat. 17 & 18 Vict. c. 125, s. 17; *Re Newton and Hetherington*, 19 C. B., N. S. 342; *Parkes* v. *Smith*, 15 Q. B. 297.

(*m*) *Ex parte Glaysher*, 3 Hurl. & Colt. 442.

(*n*) 2 Wms. Saund. 133 e, n. (*d*); *Rex* v. *Bardell*, 5 Ad. & Ell. 619; S. C., 1 Nev. & P. 74.

(*o*) *Thomson* v. *Anderson*, V.-C. M., Law Rep., 9 Eq. 523.

(*p*) *In re Rouse*, Law Rep., 6 C. P. 212.

under the statute above referred to (*q*). But it is enacted (*r*), that the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of court or judge's order or order of nisi prius in any action, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of her majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge (*s*). And the arbitrator or umpire is empowered and required to proceed with the reference notwithstanding any such revocation, and to make such award although the person making such revocation shall not afterwards attend the reference. The court, or any judge, is also empowered under any such reference, by rule or order, to command the attendance and examination of witnesses, or the production of any document (*t*). And by the act to amend the law of evidence it is now provided, that every arbitrator or other person, having by law or by consent of parties authority to hear, receive and examine evidence, may administer an oath to all such witnesses as are legally called before them respectively (*u*).

On failure of parties judge may appoint an arbitrator.

The Common Law Procedure Act, 1854, provides, that if reference is authorized to be made to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse or become incapable to act, or die, and the terms of the document authorizing the reference do not show that it was in-

(*q*) Stat. 17 & 18 Vict. c. 125, s. 17.

(*r*) Stat. 3 & 4 Will. IV. c. 42, s. 39.

(*s*) See *Scott* v. *Van Sandau*, 1 Q. B. 102.

(*t*) Stat. 3 & 4 Will. IV. c. 42, s. 40.

(*u*) Stat. 14 & 15 Vict. c. 99, s. 16.

tended that such vacancy should *not* be supplied, and the parties do not concur in appointing a new one; then any party may serve the remaining parties with a written notice to appoint an arbitrator; and if within seven clear days after such notice shall have been served no arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice, to appoint an arbitrator, who shall have the same power to act in the reference and to make an award as if he had been appointed by consent of all parties (*x*).

Death of either party.

The authority of arbitrators is liable to be determined not only by a revocation of the submission, but also by the death of either of the parties previously to the making of the award (*y*). In order to obviate this inconvenience, it is now usual to insert in the order or rule of court, by which reference is made to arbitration, a provision that the death of either of the parties shall not operate as a revocation of the authority of the arbitrators, but that the award shall be delivered to the executors or administrators of the parties, or either of them, in case of their or his decease (*z*). And the same stipulation may be effectually made in a submission to arbitration by private agreement (*a*). The bankruptcy of either party is not a determination of a submission to arbitration (*b*).

Bankruptcy.

Death, &c. of

When the reference is made to two arbitrators, one

(*x*) Stat. 17 & 18 Vict. c. 125, s. 12.

(*y*) *Cooper* v. *Johnson*, 2 Barn. & Ald. 394; *Brooke* v. *Mitchell*, 6 Mee. & Wels. 473.

(*z*) *Tyler* v. *Jones*, 3 Barn. & Cress. 144; *Prior* v. *Hembrow*, 8 Mee. & Wels. 873; 2 Wms. Saund. 133 d, n. (*d*).

(*a*) *Macdougall* v. *Robertson*, 2 You. & Jerv. 11; S. C. 4 Bing. 435; 1 Moo. & P. 147.

(*b*) *Hemsworth* v. *Bryan*, 1 C. B. 131.

appointed by each party, it is now provided (*c*), that either party may, in case of the death, refusal to act or incapacity of any arbitrator appointed by him, substitute a new arbitrator, unless the document authorizing the reference show that it was intended that a vacancy should *not* be supplied. And if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference; and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the court or a judge may revoke such appointment on such terms as shall seem just.

One of two arbitrators.

If one party fail to appoint, the other party may appoint his arbitrator to act solely.

When no time is limited for the making of the award it must be made within a reasonable time (*d*); but if a given time be limited, the award must be made within that time, unless the time for making it be enlarged (*e*). And if the award is required to be made and ready to be delivered to the parties by a certain day, it will be considered as ready to be delivered if it be made (*f*), unless the arbitrators should fail to deliver it to either of the parties on request made for that purpose on the last day (*g*). The submission to arbitration frequently contains a power for the arbitrators or umpire to enlarge the time for making the award; and in this case the time may be enlarged from time to time (*h*) by such

Time for making the award.

Enlargement of time.

(*c*) Stat. 17 & 18 Vict. c. 125, s. 13.

(*d*) *Macdougall* v. *Robertson*, ubi supra.

(*e*) 1 Wms. Saund. 327 a, n. (3).

(*f*) *Bradsey* v. *Clyston*, Cro. Car. 541.

(*g*) *Brooke* v. *Mitchell*, 6 Mee. & Wels. 473.

(*h*) *Payne* v. *Deakle*, 1 Taunt. 509; *Barrett* v. *Parry*, 4 Taunt. 658.

arbitrators or umpire (*i*), provided the enlargement be made on or before the expiration of the time originally limited for making the award (*k*). And if the submission be made a rule of court, then, whether the arbitrators or umpire have power to enlarge the time or not (*l*), the court, or a judge thereof, has power to enlarge the time (*m*). And should no enlargement be formally made, yet the parties may, by continuing their attendance on the reference, or by recognizing the proceedings under it, virtually empower the arbitrators or umpire to make a valid award subsequently to the time originally limited (*n*). And the Common Law Procedure Act, 1854, now provides, that the arbitrator acting under any such document or compulsory order of reference, as mentioned in the act, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party; but the parties may, by consent in writing, enlarge the term for making the award. And the superior court of which such submission, document, or order is or may be made a rule or order, or any judge thereof, may for good cause truly stated in the rule or order for enlargement from time to time enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month (*o*). The

(*i*) See *Dimsdale* v. *Robertson*, 2 Jones & Lat. 58.

(*k*) See *Reid* v. *Fryatt*, 1 M. & Sel. 1; *Mason* v. *Wallis*, 10 B. & Cress. 107.

(*l*) *Parbery* v. *Newnham*, 7 Mee. & Wels. 378; *Leslie* v. *Richardson*, 6 C. B. 378.

(*m*) Stat. 3 & 4 Will. IV. c. 42, s. 39; *Re Warner and Powell's Arbitration*, V.-C. S., Law Rep., 3 Eq. 261.

(*n*) *Rex* v. *Hill*, 7 Price, 636.

(*o*) Stat. 17 & 18 Vict. c. 125, s. 15.

word "month" in an act of parliament now means a calendar month (*p*).

In proceeding in the business of the arbitration, the arbitrators are bound to require the attendance of the parties, for which purpose notice of the meetings of the arbitrators should be given to them (*q*). But if either party neglect to attend either in person or by attorney, after due notice, the arbitrators may proceed without him (*r*). In taking the evidence the arbitrators are at liberty to proceed in any way they please, if the parties have due notice of their proceedings, and do not object before the award is made (*s*). But each must use his own judgment (*t*); and, in order to obviate any objection, they ought to proceed in the admission of evidence according to the ordinary rules of law (*u*). The award should be signed by the arbitrators in each other's presence (*x*), and when made it must be both certain and final. Thus if the award be that one party enter into a bond with the other for his quiet enjoyment of certain lands; this award is void for uncertainty; for it does not appear in what sum the bond should be (*y*). With regard to certainty, however, the rule of law is *id certum est quod certum reddi potest*, and therefore an award that one of the parties should pay the costs of an action is good without fixing the amount of the costs, for that may be ascertained by the taxing officer (*z*).

Attendance of the parties.

Mode of proceeding.

Award must be certain and final.

(*p*) Stat. 13 & 14 Vict. c. 21, s. 4.

(*q*) *Anon.*, 1 Salk. 71.

(*r*) *Harcourt* v. *Ramsbottom*, 1 Jac. & Walk. 512; *Scott* v. *Van Sandau*, 6 Q. B. 237.

(*s*) *Ridout* v. *Pye*, 1 Bos. & P. 91.

(*t*) *Whitmore* v. *Smith*, 5 H. & N. 824.

(*u*) *Attorney-General* v. *Davison*, M'Cl. & Y. 160.

(*x*) *Stalworth* v. *Inns*, 13 Mee. & Wels. 466; *Wade* v. *Dowling*, Q. B., 18 Jur. 728; 2 E. & B. 44; *Eads* v. *Williams*, 4 De Gex, M. & G. 674, 688.

(*y*) *Samon's case*, 5 Rep. 77 b.

(*z*) *Cargey* v. *Aitcheson*, 2 B. & Cress. 170; S. C., 3 Dowl. & Ry. 433; 2 Wms. Saund. 293 b, n. (*a*).

On the question of finality many cases have arisen. If the arbitrators be *empowered* to decide all matters in difference between the parties, the award will not necessarily be wanting in finality for not deciding on all such matters, unless it appear to have been *required* that all such matters should be determined by the award (*a*). If the award reserve to the arbitrators (*b*), or give to any other person (*c*), or to one of the parties (*d*), any further authority or discretion in the matter, it will be bad for want of finality. And if the award be that any stranger to the reference should do an act, or that money should be paid to, or any other act done in favour of, a stranger, unless for the benefit of one of the parties (*e*), such award will be void (*f*). An award, however, may be partly good and partly bad, provided the bad part is independent of and can be separated from that which is good (*g*). But if, by reason of the invalidity of part of the award, one of the parties cannot have the advantage intended for him as a recompense for that which he is to do, according to that part of the award which would otherwise be valid, the whole will be void (*h*). If it should appear on the face of the award that the arbitrators, intending to decide a point of law, have fallen into an obvious mistake of the law, the award will be invalid (*i*). But where subjects involving questions

(*a*) *Wrightson* v. *Bywater*, 3 Mee. & Wels. 199; 1 Wms. Saund. 32 a, n. (*a*).

(*b*) *Manser* v. *Heaver*, 3 Bar. & Adol. 295.

(*c*) *Tomlin* v. *Mayor of Fordwich*, 5 Ad. & Ell. 147; *Eastern Counties Railway Company* v. *Eastern Union Railway Company*, 3 De Gex, J. & S. 610.

(*d*) *Glover* v. *Barrie*, 1 Salk. 71.

(*e*) *Wood* v. *Adcock*, 7 Ex. Rep. 468.

(*f*) *Cooke* v. *Whorwood*, 2 Saund. 337; *Adam* v. *Statham*, 2 Lev. 235; *Fisher* v. *Pimbley*, 11 East, 188.

(*g*) *Fox* v. *Smith*, 2 Wils. 267; *Aitcheson* v. *Curgey*, 2 Bing. 199.

(*h*) 2 Wms. Saund. 293 b, n. (1).

(*i*) *Ridout* v. *Pain*, 3 Atk. 494; *Richardson* v. *Nourse*, 3 Barn. & Ald. 237.

both of law and fact are referred to arbitration, the arbitrators may make an award according to what they believe to be the justice of the case, irrespective of the law on any particular point (*k*). And it is now provided, that it shall be lawful for the arbitrator, upon any compulsory reference under the Common Law Procedure Act, 1854, or upon any reference by consent of parties, where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award as to the whole or any part thereof in the form of a special case for the opinion of the court; and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court (*l*).

Arbitrator may state special case for the opinion of the court.

When the submission to arbitration is not made the rule of any other court (*m*), the Court of Chancery, according to the ordinary principles of equity, has power to set aside the award for corruption or other misconduct on the part of the arbitrators, or if they should be mistaken in a plain point of law or fact (*n*). If the submission be made a rule of court under the above-mentioned statute of Will. III. (*o*), the court of which it is made a rule has power to set aside the award, not only on the grounds of corruption or undue practice mentioned in the act, but also for mistakes in point of law (*p*); and no other court has a right to entertain any

Setting aside the award.

(*k*) *Re Badger*, 2 Barn. & Ald. 691; *Young* v. *Walker*, 9 Ves. 364; *Hodgkinson* v. *Fernie*, 3 C. B., N. S. 189.

(*l*) Stat. 17 & 18 Vict. c. 125, s. 5. No error can be brought on the judgment of the court, *Courtauld* v. *Legh*, Law Rep., 4 Ex. 187.

(*m*) *Nichols* v. *Roe*, 3 Myl. & Keen, 431.

(*n*) *Ridout* v. *Pain*, 3 Atk. 494.

(*o*) Stat. 9 & 10 Will. III. c. 15.

(*p*) *Zachary* v. *Shepherd*, 2 T. Rep. 781; *Lowndes* v. *Lowndes*, 1 East, 276, overruling *Anderson* v. *Coxeter*, 1 Stra. 301; see 1 Wms. Saund. 327 d, n. (*s*).

application for this purpose (*q*). The application to set aside the award must, however, be made within the time limited by the act (*r*). But although the time limited by that statute may have expired, yet if there be any defect apparent on the face of the award, the court will not assist in carrying it into effect by granting an attachment for its nonperformance (*s*). If the submission to arbitration be made by rule or order of the court in any cause independently of the statute, the court still retains its ancient jurisdiction of setting aside the award on account either of the misconduct of the arbitrators, or of their mistake in point of law (*t*). In analogy, however, to the practice under the statute of Will. III., the court in ordinary cases requires application for setting aside the award to be made within the time limited by that statute (*u*); but upon sufficient grounds it will grant such an application, though made after the expiration of that time (*x*). All applications, however, to set aside any award made on a compulsory reference under the Common Law Procedure Act, 1854, must be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, the award is final (*y*). The court or a judge has also power under this act to remit the matters referred to arbitration, or any of them, to the reconsideration of

(*q*) Stat. 9 & 10 Will. III. c. 15, s. 2; *Nichols* v. *Roe*, 3 Myl. & Keen, 431.

(*r*) *Lowndes* v. *Lowndes*, 1 East, 276; *ante*, p. 194.

(*s*) *Pedley* v. *Goddard*, 7 T. Rep. 73.

(*t*) *Lucas* v. *Wilson*, 2 Burr. 701.

(*u*) *Macarthur* v. *Campbell*, 5 Barn. & Adol. 518; *Smith* v. *Whitmore*, 1 Hem. & Mill. 576, affirmed 10 Jur., N. S. 1190.

(*x*) *Rawsthorn* v. *Arnold*, 6 Barn. & Cress. 629; S. C., 9 Dow. & Ry. 556.

(*y*) Stat. 17 & 18 Vict. c. 125, s. 9.

the arbitrator, upon such terms as to costs and otherwise as to such court or judge may seem proper (*z*). After the award has been executed by the arbitrator, he has no power to amend even a clerical error, but the matter must be remitted to him by the court or a judge under the above act (*a*).

Two arbitrators may appoint an umpire.

It is usual to provide for the appointment of an umpire in case the parties should disagree. But the Common Law Procedure Act, 1854, now provides (*b*), that when the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended that there should *not* be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon to make the appointment sooner, by notice under the following provision. And if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator, or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should *not* be supplied, and the parties or arbitrators respectively do not appoint a new one, then any party may serve the remaining parties, or the arbitrators as the case may be, with a written notice to appoint an umpire or third arbitrator; and, if within seven clear days after such notice shall have been served no umpire or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons

On failure of parties judge may appoint an umpire.

(*z*) Stat. 17 & 18 Vict. c. 125, s. 8.

(*a*) *Mordue* v. *Palmer*, 19 W. R. 86; Law Rep., 6 Ch. Ap. 22.

(*b*) Stat. 17 & 18 Vict. c. 125, s. 14.

to be taken out by the party having served such notice, to appoint an umpire or third arbitrator, who shall have the same power to act in the reference and make an award as if he had been appointed by consent of all parties (*c*).

Umpire.

If an umpire be appointed, his authority to make an award commences from the time of the disagreement of the arbitrators (*d*), unless some other period be expressly fixed; and if, after the disagreement of the arbitrators, he make an award before the expiration of the time given to the arbitrators to make their award, such award will nevertheless be valid (*e*). And it is now provided that if the arbitrators shall have allowed their time, or their extended time, to expire without making an award, or shall have delivered to any party, or to the umpire, a notice in writing stating that they cannot agree, the umpire may enter on the reference in lieu of the arbitrators (*f*). The umpire must be chosen by the arbitrators in the exercise of their judgment and at the same time (*g*), and must not be determined by lot (*h*), unless all the parties to the reference consent to his appointment by such means (*i*). In order to enable him to form a proper decision, he ought to hear the whole evidence over again (*k*), unless the parties should be satisfied with his deciding on the statement of the

(*c*) Stat. 17 & 18 Vict. c. 125, s. 12; see *Re Lord*, 1 K. & Johnson, 90; *Collins* v. *Collins*, 26 Beav. 306.

(*d*) *Smailes* v. *Wright*, 3 Man. & Sel. 559; *Sprigens* v. *Nash*, 5 Man. & Sel. 193.

(*e*) *Sprigens* v. *Nash*, ubi sup.

(*f*) Stat. 17 & 18 Vict. c. 125, s. 15.

(*g*) *Re Lord*, Q. B., 1 Jur., N. S. 893; 5 E. & B. 404.

(*h*) *In Re Cassell*, 9 Barn. & Cress. 624; *Ford* v. *Jones*, 3 Barn. & Adol. 248; *European, &c. Shipping Company* v. *Crosskey*, 8 C. B., N. S. 397. See, however, *Re Hopper*, Law Rep., 2 Q. B. 367; 8 Best & Smith, 100.

(*i*) *Re Jamieson*, 4 Adol. & Ell. 945.

(*k*) *Re Salkeld*, 12 Ad. & Ell. 767; *Re Hawley*, 2 De Gex & Smale, 33.

arbitrators (*l*). And the whole matter in difference must be submitted to his decision, and not some particular points only on which the arbitrators may disagree (*m*).

Award for payment of money creates a debt.

An award for the payment of money creates a debt from one party to the other, for which an action may be brought in any court of law (*n*), and which will be sufficient to support a petition for adjudication of bankruptcy (*o*). But when the award is made a rule of court, its performance may, as we have seen (*p*), be enforced by attachment. And where the reference is made by order of the Court of Chancery (*q*), or where the award requires any act to be done which cannot be enforced by an action at law (*r*), equity will decree a specific performance. And it is now provided that when any award directs possession of any lands or tenements to be delivered to any party, the court, of which the document authorizing the reference is or is made a rule or order, may order any party to the reference who shall be in possession of such lands or tenements, or any person in possession of the same, claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the same to the party entitled thereto pursuant to the award; and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment (*s*).

(*l*) *Hall* v. *Lawrence*, 4 T. Rep. 589.

(*m*) *Tollit* v. *Saunders*, 9 Price, 612.

(*n*) 2 Wms. Saund. 62 a, n. (5).

(*o*) *Ex parte Lingard*, 1 Atk. 241.

(*p*) *Ante*, p. 192.

(*q*) *Marquis of Ormond* v. *Kynnersley*, 2 Sim. & Stu. 15; *Wood* v. *Taunton*, 11 Beav. 449.

(*r*) *Hall* v. *Hardy*, 3 P. Wms. 190.

(*s*) Stat. 17 & 18 Vict. c. 125, s. 16.

Award under seal not a deed.

Stamp.

The award of arbitrators or of an umpire, though indented and under hand and seal, is not a deed unless delivered as such (*t*). It is now subject to stamp duty according to the table in the note (*u*).

(*t*) *Brown* v. *Vawser*, 4 East, 584.

(*u*) Stat. 33 & 34 Vict. c. 97.

	£	*s.*	*d.*
Where the amount or value of the matter in dispute does not exceed £5 ..	0	0	3
Exceeds £5 and does not exceed £10	0	0	6
„ 10 „ 20	0	1	0
„ 20 „ 30	0	1	6
„ 30 „ 40	0	2	0
„ 40 „ 50	0	2	6
„ 50 „ 100	0	5	0
„ 100 „ 200	0	10	0
„ 200 „ 500	0	15	0
„ 500 „ 750	1	0	0
„ 750 „ 1,000	1	5	0
And where it exceeds £1,000, and in any other case not above provided for	1	15	0

PART III.

OF INCORPOREAL PERSONAL PROPERTY.

CHAPTER I.

OF PERSONAL ANNUITIES, STOCKS AND SHARES.

In addition to goods and chattels in possession, which have always been personal property, and to debts which have long since been considered so, there exist in modern times several species of incorporeal personal property, to which we now propose to direct our attention. These species of property are certainly not *choses in possession*, neither yet are they like debts strictly *choses in action*, though often classed as such. In analogy, therefore, to the well-known division of real estate into corporeal and incorporeal, we have ventured to place these kinds of property together into a class to be denominated *incorporeal personal property*. A debt no doubt is also incorporeal, but it is still well characterized by its ancient name of a *chose in action*.

Personal annuity.

The first kind of incorporeal personal property which we shall mention is a *personal annuity*. This kind of property is not indeed of so modern an origin as some of those which we shall hereafter mention. It consists of an annual payment, not charged on real estate; but it may nevertheless be limited to the heirs, or the heirs of the body of the grantee. In former times it was doubted whether an annuity was not a mere *chose in action*, and therefore incapable of assignment (*a*); but

(*a*) Co. Litt. 144 b, n. (1).

this objection has long been overruled. When limited to the heirs of the grantee it will, on his intestacy, descend, like real estate, to his heir; but it is still personal property (*b*), and will pass by his will under a bequest of all his personal estate (*c*). When given to the grantee and the heirs of his body, the grantee does not acquire an estate tail; for this kind of inheritance is not a *tenement* within the meaning of the statute *De Donis Conditionalibus* (*d*). The grantee has merely a fee simple *conditional* on his having issue, such as a grantee of lands would have had under a similar grant prior to the statute *De Donis* (*e*), or as a copyholder would now take in manors where there is no custom to entail (*f*). When the grantee has issue, he may therefore alien the annuity in fee simple by a mere assignment; but should he die without issue the annuity will fail. A personal annuity given to a man *for ever* will devolve on the executor, and not on the heir of the grantee (*g*).

Stock or bank annuities did not exist before the Revolution.

The next kind of incorporeal personal property to be considered is stock in the public funds, or bank annuities. Previously to the Revolution in 1688 there was no funded debt properly so called; although King Charles I. and King Charles II. both found occasion to raise money by the grant of annuities in fee simple chargeable on particular branches of the revenue. These annuities, not being payable out of real estate,

(*b*) *Earl of Stafford* v. *Buckley*, 3 Ves. sen. 171; *Radburn* v. *Jervis*, 3 Beav. 450, 461.

(*c*) *Aubin* v. *Daly*, 4 Barn. & Ald. 59.

(*d*) *Turner* v. *Turner*, 2 Amb. 776, 782; *Earl of Stafford* v. *Buckley*, ubi sup.

(*e*) See Principles of the Law of Real Property, 30, 36, 2nd ed.; 32, 38, 3rd & 4th eds.; 35, 41, 5th, 6th, 7th & 8th eds.; 36, 42, 9th & 10th eds.

(*f*) Ibid. 286, 2nd ed.; 295, 3rd ed.; 299, 4th ed.; 310, 5th ed.; 327, 6th ed.; 334, 7th ed.; 349, 8th ed.; 345, 9th ed.; 348, 10th ed.

(*g*) *Taylor* v. *Martindale*, 12 Sim. 158.

appear to have been the first instances of personal annuities limited to the grantees and their heirs, and they gave occasion to those law suits by which the legal nature and incidents of personal annuities have been determined; although some mention of such annuities is certainly to be found in the old books (*h*). Soon after the Revolution, however, a portion of the public debt was funded, or transferred into perpetual annuities, payable, by way of interest, on the capital advanced, which capital was to be repaid by the government in the manner agreed on. And from that time to the present, the funded debt of the country has, by several acts of parliament, been greatly increased. Stock in the funds, therefore, is merely a right to receive certain annuities, by half-yearly dividends, as they become due (*i*), subject to the right of government to redeem such annuities on payment of a stipulated sum, which sum is the nominal value of the stock. Thus, 100*l.* £3 per cent. Consolidated Bank Annuities is a right to receive 3*l.* per annum for ever, subject to the right of government to redeem this annuity on payment of 100*l.* sterling. The actual value of 100*l.* £3 per cent. Consolidated Bank Annuities (or *Consols* as they are shortly termed) of course depends on the state of the stock market, being generally lower, though it has been higher, than the nominal price, which is called *par*.

The funds are redeemable annuities.

The public funds are composed of several separate stocks, of which, however, by far the largest and most important are the consols. In this fund alone the Court of Chancery formerly invested all the money committed to its care belonging to the suitors in that court: and,

Consols formerly the investment of the Court of Chancery.

(*h*) Co. Litt. 144 b; Fitz. N. B. 152 a.

(*i*) *Wildman* v. *Wildman*, 7 Ves. 174, 177; *Rawlings* v. *Jennings*, 13 Ves. 38, 45. Dividend warrants may now be sent by post, stat. 33 & 34 Vict. c. 71, s. 20.

as it is a rule of equity, that whatever the Court would certainly order to be done may be done without applying to the Court, every trustee and executor was justified in investing in consols any money which he might have held in trust, without any express direction for that purpose (*j*). But should he have invested trust money upon any other security, without express authority so to do, he would have been answerable to his cestui que trust for the amount of the money so invested, should the security have failed; and it seems also, that the cestui que trust had an option either to claim the money, or to have so much stock as the money improperly invested would have purchased at the time when the improper investment was made (*k*). But when the trustee was authorized by the terms of his trust to invest either in the funds or on real securities, it was decided, after much conflict of opinion, that the cestui que trust had no option to charge the defaulting trustee with any larger sum than the amount of the money lost, with interest at four per cent. For had the trustee chosen, as he might, to invest on real security, the cestui que trust would have gained nothing by the subsequent rise in the funds (*l*). Recent enactments have, however, now largely extended the investments in which trust funds may be placed (*m*).

Liability of trustee not investing in consols.

The legal nature and incidents of stock in the public funds were fixed by the various acts of parliament by which these funds were created. These statutes are far

(*j*) *Howe* v. *Lord Dartmouth*, 7 Ves. 150; *Holland* v. *Hughes*, 16 Ves. 114; *Tebbs* v. *Carpenter*, 1 Mad. 306; *Norbury* v. *Norbury*, 4 Mad. 191.

(*k*) *Forrest* v. *Elwes*, 4 Ves. 497; *Pride* v. *Fooks*, 2 Beav. 430; *Robinson* v. *Robinson*, Lords Justices, 1 De Gex, Mac. & Gord. 247.

(*l*) *Robinson* v. *Robinson*, ubi sup., overruling *Watts* v. *Girdlestone*, 6 Beav. 188, *Ames* v. *Parkinson*, 7 Beav. 379, and *Ouseley* v. *Anstruther*, 10 Beav. 456.

(*m*) See *post*, the chapter on "SETTLEMENTS."

too numerous to be here mentioned; but their provisions are generally similar. They have all been consolidated, with amendments, by the National Debt Act, 1870 (*n*). By one of the earliest of these statutes (*o*), it was provided, that all persons who should be entitled to any of the annuities thereby created, and all persons lawfully claiming under them, should be possessed thereof *as of a personal estate, and the same should not be descendible to the heir.* And the National Debt Act, 1870, now provides that the perpetual annuities, which form part of the national debt, shall continue to be personal estate, and not descendible to heirs (*p*).

The National Debt Act, 1870.

Stock is personal estate.

The transfer of stock in the public funds is effected only by the signature of the books at the Bank of England in the manner prescribed by act of parliament; and this transfer may be effected either in person or by attorney thereunto lawfully authorized, by writing, under hand and seal, attested by two or more credible witnesses (*q*). The legal title to stock belongs to the person in whose name it is standing in the bank books; and the Bank refuses to recognize trusts, or to keep more than one account for the same person; neither will it allow of the transfer of any stock into the names of more than four persons. Formerly the right to stock always carried the right to the current half-year's dividends, and the transfer books were closed for some days prior to the days of payment of the dividends. But a day for closing the books is now fixed in the month preceding that in which the dividends are payable, and the person whose name then appears inscribed in the books as proprietor is, as between him and the transferee,

Transfer of stock.

Dividends.

(*n*) Stat. 33 & 34 Vict. c. 71.
(*o*) Stat. 1 Geo. I. st. 2, c. 19, s. 9, now repealed by stat. 33 & 34 Vict. c. 69.
(*p*) Stat. 33 & 34 Vict. c. 71, s. 9.
(*q*) Sect. 22.

entitled to the current half-year's dividend; and after that day the person to whom any transfer is made is not entitled to the current dividend (*r*). When stock is standing in the name of a trustee, the beneficial owner may transfer his equitable interest in any manner he pleases. As the claim of the beneficial owner is equitable only, there will be no occasion to give to the transferee a power of attorney to sue in the name of the transferor (*s*); and the transferee, on giving notice of the transfer to the trustee, will be entitled to a legal transfer of the stock into his own name in the books at the Bank. A recent act of parliament contains provisions for the conversion of stock, transferable only at the Bank, into stock certificates payable to bearer, and transferable accordingly from hand to hand (*t*).

Stock in the name of a trustee.

Stock certificates.

As the constant fluctuations of the value of the funds were long since found to present a great temptation to gambling on the chance of their rise or fall, an act was passed in the reign of Geo. II. (*u*) for the purpose of suppressing such transactions. This act was introduced into parliament by Sir John Barnard, whose name it bears, and it was intituled "An Act to prevent the infamous Practice of Stockjobbing." It contained several provisions directed against the practice of fictitious sales of stock for a future time, where the seller had not the stock he sold, neither intended to procure it, and the buyer had no intention to purchase the amount he contracted for; but the only object of the parties was that, should the stock rise, the vendor should pay the buyer the difference occasioned by the increase in price, and,

Sir John Barnard's Act.

(*r*) Stat. 24 Vict. c. 3, s. 7, repealed by stat. 33 & 34 Vict. c. 69, and re-enacted by stat. 33 & 34 Vict. c. 71, s. 25.

(*s*) See *ante*, p. 6.

(*t*) Stat. 26 Vict. c. 28, repealed by stat. 33 & 34 Vict. c. 69, and re-enacted by stat. 33 & 34 Vict. c. 71, part 5, ss. 26 *et seq.*

(*u*) Stat. 7 Geo. II. c. 8.

should it fall, the buyer should pay the vendor the difference occasioned by the decrease (*v*). But this act, having been found to interfere with legitimate transactions, has lately been repealed (*w*).

Contract for sale of stock not within the Statute of Frauds.

It seems that stock is not *goods, wares* or *merchandize* within the 17th section of the Statute of Frauds (*x*), so that it does not require a written memorandum for a contract for its sale, if the value exceeds ten pounds and the buyer does not accept and receive any part, nor give something in earnest to bind the bargain or in part payment (*y*). Contract notes for the sale or purchase of any stock or marketable security of the value of five pounds or upwards, are now liable to a stamp duty of one penny (*z*); and every mortgage of any stock or marketable security is subject to a stamp duty of ten shillings for every 5,000*l.*, and also for any fractional part of 5,000*l.*, of the amount secured. And no release or discharge of any such mortgage is chargeable with any ad valorem duty (*a*).

Stamp duty on contract notes, and on mortgage of stock.

Infants.

By a modern act of parliament, the Court of Chancery is empowered to order the dividends of stock belonging

(*r*) See *Child* v. *Morley*, 8 T. Rep. 610; *Heckscher* v. *Gregory*, 4 East, 607, 614. The buyer who is interested in the rise of the funds is called, in the language of the Stock Exchange, a *bull*, the seller is a *bear*, but either party, if unable to pay his differences, becomes a *lame duck*. A stock-jobber, properly so called, is a person who supplies the public, through the medium of the brokers, with money or stock to the exact amount they may require, making a profit only of 1-8th per cent. on each transaction; a course of business altogether different from the "infamous" practices usually called stockjobbing by the public.

(*w*) Stat. 23 Vict. c. 28.

(*x*) Stat. 29 Car. II. c. 3. See *ante*, p. 39.

(*y*) See *Numes* v. *Scipio*, 1 Com. 356; *Pickering* v. *Appleby*, 1 Com. 354; 2 P. Wms. 308; *Pawle* v. *Gunn*, 4 Bing. N. C. 445; *Humble* v. *Mitchell*, 11 A. & E. 205; *Knight* v. *Barber*, 16 M. & W. 66.

(*z*) Stat. 33 & 34 Vict. c. 97, Schedule, tit. Contract Note.

(*a*) Stat. 34 Vict. c. 4, s. 5.

to infants to be applied for their maintenance (*b*). By another act the Lord Chancellor is empowered to appoint a person to transfer stock and receive and pay over dividends standing in the name of or vested in any lunatic, idiot or person of unsound mind beneficially entitled thereto, or standing in the name of or vested in the committee of a lunatic who may have died intestate, or himself become lunatic, or may be out of the jurisdiction of or not amenable to the process of the Court of Chancery, or if it be uncertain whether such committee be living or dead, or if he should neglect or refuse to transfer such stock and to receive and pay over the dividends thereof (*c*). And the Lord Chancellor is also empowered to appoint a person to transfer stock standing in the name of or vested in any lunatic residing out of England; and also to receive and pay over the dividends thereof to the curator of such lunatic or otherwise as the Lord Chancellor shall think fit (*d*). By another recent act it is provided, that, when stock shall be standing in the name of any infant or person of unsound mind jointly with any person not under any legal disability, such person may alone give a power of attorney to receive the dividends (*e*). And generally the land or stock of any lunatic, in possession, reversion or expectancy, may be sold or mortgaged for the payment of his debts, or for his maintenance and otherwise for his benefit (*f*).

Lunatics and idiots.

Distringas.

When any person has an interest in stock standing in the name of another he is enabled to restrain the transfer of such stock, or as it is said, to *put a stop upon it*, by means of a writ of *distringas*, to be served upon

(*b*) Stat. 11 Geo. IV. & 1 Will. IV. c. 65, s. 32.

(*c*) Stat. 16 & 17 Vict. c. 70, s. 140.

(*d*) Sect. 141.

(*e*) Stat. 8 & 9 Vict. c. 97, s. 3, repealed by stat. 33 & 34 Vict. c. 69, and re-enacted by stat. 33 & 34 Vict. c. 71, s. 19.

(*f*) Stat. 16 & 17 Vict. c. 70, s. 116; 25 & 26 Vict. c. 86, ss. 12—14.

the Bank of England. This writ appears to be in strictness a proceeding in a suit supposed to have been commenced by the party obtaining it against the Bank and the legal owner of the stock; but in practice a suit is not commenced, unless the right to stop the stock be disputed (*g*). This writ formerly issued only out of the equity side of the Court of Exchequer; but when the equitable jurisdiction of that court was transferred to the Court of Chancery, it was provided that a writ of *distringas*, in a prescribed form, should issue out of the latter court, the force and effect of which, and the practice relating to the same, should be such as was previously in force in the Court of Exchequer (*h*). The writ commands the sheriff to *distrain* the Bank by their lands and chattels, so that they appear in court to answer a bill of complaint lately exhibited against them and other defendants by the person obtaining the writ. The object of the writ is stated in a notice, which is served along with it, to be for the purpose of restraining any transfer of the stock in question until the order of the court be obtained. An appearance is accordingly entered by the Bank, and the transfer of the stock is thus delayed. When the *distringas* is required to be removed, an order of the court may be readily obtained for the dismissal of the supposed suit. It is surprising that a course by which a cestui que trust of stock may be so effectually protected from any fraudulent transfer by his trustee should not be more frequently adopted.

Stock may be charged with judgment debts.

Stock, being a kind of *chose in action*, could not formerly have been sold under a *fieri facias* issued in execution of a judgment against the owner (*i*). And, in fact, in the acts by which stocks were created, it was

(*g*) See Wilkinson on the Funds, 235—252; *Re Cross*, 1 Drew. & Sm. 580. This writ may be applied to any stock. See Daniel's Chancery Practice, vol. 2, p. 1528.

(*h*) Stat. 5 Vict. c. 5, s. 5.

(*i*) *Dundas* v. *Dutens*, 1 Ves. jun. 198.

declared that they should not be taken in execution (*k*). But by the act for extending the remedies of creditors against the property of debtors (*l*), it is provided that any judge of one of the superior courts of common law (*m*), on the application of any judgment creditor, may order that any government stock of the debtor standing in his own name, or in the name of any person in trust for him, shall stand charged with the payment of the judgment debt and interest; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to, if such charge had been made in his favour by the debtor; but no proceedings are to be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order (*n*). And by a subsequent act of parliament (*o*), this provision is declared to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in such stock as in the dividends or annual produce thereof, and also to stock in which the debtor may be interested standing in the name of the accountant-general of the Court of Chancery (*p*). And in order to prevent any judgment debtor from disposing of the stock authorized to be charged, an order may be procured by the creditor, in the first instance *ex parte*, restraining the Bank of England from permitting a

(*k*) *Bank of England* v. *Lunn*, 15 Ves. 577.

(*l*) Stat. 1 & 2 Vict. c. 110, s. 14.

(*m*) *Miles* v. *Presland*, 4 Myl. & Cr. 431.

(*n*) See *Watts* v. *Jefferyes*, 3 Mac. & Gord. 372; *Watts* v. *Porter*, Q. B., 1 Jur., N. S. 133; 3 E. & B. 743; *contra*, *Beavan* v. *Earl of Oxford*, 6 De Gex, M. & G. 524, 525, 532; *Scott* v. *Lord Hastings*, 4 Kay & J. 633, 638; *Crow* v. *Robinson*, L. R., 3 C. P. 264, 267; *Pickering* v. *Ilfracombe Railway Co.*, L. R., 3 C. P. 235, 251.

(*o*) Stat. 3 & 4 Vict. c. 82, s. 1. See *Hulkes* v. *Day*, 10 Sim. 41.

(*p*) See *Warburton* v. *Hill*, Kay, 470; *Haly* v. *Barry*, L. R., 3 Ch. Ap. 452, 456, 457. By stat. 35 & 36 Vict. c. 44, the duties of the accountant-general of the Court of Chancery are transferred to the paymaster-general.

transfer of the stock until the order shall either be made absolute (that is, confirmed and continued) or discharged; and no disposition of the judgment debtor in the meantime is to be valid or effectual as against the creditor. And the order will be made absolute if the debtor do not, within a time mentioned in the order, show cause to the contrary (*q*). When the debtor is entitled to the dividends of stock standing in the names of trustees, the order obtained by the creditor charging such dividends will be binding on the trustees; but the Bank must still pay the dividends to the trustees as legal owners (*r*).

Transmission of stock by will.

The history of the law respecting the transmission of stock by will affords a curious instance of the enactments of the legislature having been virtually overruled by the decisions of the Court of Chancery. The acts by which the funds were created provided, that any person possessed of stock might devise the same by will in writing *attested by two or more credible witnesses*, but that such devisee should receive no payment till so much of the will as related to the stock had been entered in the office at the Bank; and in default of such devise the stock should go to the executors or administrators (*s*). The Court of Chancery however held, that as stock had been declared by parliament to be personal estate, it must, like all other personal estate, devolve, in the first instance, on the executor for payment of debts, even though it should have been specially bequeathed (*t*); and that the executor, having it in his hands by virtue of his office of executor, was bound after payment of

(*q*) Stat. 1 & 2 Vict. c. 110, s. 15.

(*r*) *Churchill* v. *Bank of England*, 11 Mee. & Wels. 323; *Bristead* v. *Wilkins*, 3 Hare, 235; and see *Taylor* v. *Turnbull*, 4 H. & N. 495.

(*s*) Stat. 1 Geo. I. stat. 2, c. 19, s. 12, and subsequent acts.

(*t*) *Bank of England* v. *Moffatt*, 3 Bro. C. C. 260; *Bank of England* v. *Parsons*, 5 Ves. 665; *Bank of England* v. *Lunn*, 15 Ves. 569.

debts, to dispose of it according to the will of his testator, even although such will were unattested (*u*). For, previously to the act for the amendment of the laws with respect to wills (*x*), a will of personal estate required no attestation. In effect, therefore, a person was enabled to bequeath his stock by a will unattested. All wills, however, are now required to be attested by two witnesses. And by a recent act of parliament the provisions of the old acts, which had virtually been disregarded, have been formally repealed; and it is declared that the stock of a deceased person may be transferred by his executors or administrators, notwithstanding any specific bequest or disposition thereof contained in the will; but the Bank are not to be required to allow of such transfer, or of the receipt of any dividend on the stock, until the probate of the will or the letters of administration shall have been first left at the Bank for registration. And the Bank may require all the executors who shall have proved the will to concur in the transfer (*y*). And the registry of specific bequests of stock is no longer required.

Shares.

The next kind of incorporeal personal property which we shall mention are shares in joint stock companies. Joint stock companies were formerly of two kinds, those which were incorporate, or made into *corporations*, and those which were not so.

Corporations sole and aggregate.

Corporations are legal personages, always known by the same name, and preserving their identity through a perpetual succession of natural persons. They are either corporations *sole*, composed only of one person, such as

(*u*) *Ripley* v. *Waterworth*, 7 Ves. 440; *Franklin* v. *Bank of England*, 1 Russ. 575, 589.

(*x*) Stat. 7 Will. IV. & 1 Vict. c. 26.

(*y*) Stat. 8 & 9 Vict. c. 97, s. 1, repealed by stat. 33 & 34 Vict. c. 69, and re-enacted by stat. 33 & 34 Vict. c. 71, ss. 17, 23.

a bishop, a parson, or the chamberlain of London; or corporations *aggregate*, composed of many persons acting on all solemn occasions by the medium of their *common seal* (*z*); and it is of such corporations that we are now about to speak. Such corporations may be created either by charter conferred by the queen's letters-patent, or by act of parliament. And, till a few years ago, all joint stock companies which had not obtained this expensive sanction were in fact private partnerships on an extended scale. In the present reign, however, as we shall hereafter see, provision has been made for the incorporation of all public joint stock companies (*a*); but such companies as are incorporated by letters-patent or special act of parliament still enjoy peculiar privileges. These companies therefore first require notice.

Companies incorporated by charter or act.

The nature and incidents of shares in the joint stock of companies incorporated by letters-patent or act of parliament have generally been determined by their respective charters or acts of incorporation. And in the great majority of cases, and in all the modern charters and acts of incorporation, the shares are declared to be personal estate, and transmissible as such. In a few of the older companies, of which the New River Company is an instance (*b*), the shares are real estate in the nature of incorporeal hereditaments. For the future, however, all the provisions contained in special acts for the incorporation of joint stock companies will, as far as possible, be the same. For an act of parliament has been passed "for consolidating in one act certain provisions usually inserted in acts with respect to the constitution

The Clauses Consolidation Acts.

(*z*) See Bac. Abr., tit. Corporations; 1 Black. Com. ch. 18.

(*a*) Stat. 7 & 8 Vict. c. 110; partly repealed by stat. 20 & 21 Vict. c. 14, s. 23; 7 & 8 Vict. c. 113, partly repealed by stat. 20 & 21 Vict. c. 49; all now repealed by the Companies Act, 1862, stat. 25 & 26 Vict. c. 89.

(*b*) *Dryhutter* v. *Bartholomew*, 2 P. Wms. 127.

of companies incorporated for carrying on undertakings of a public nature" (*c*). Other acts have also been passed for consolidating certain provisions usually inserted in acts authorizing the taking of lands for undertakings of a public nature (*d*); in acts authorizing the making of railways (*e*); in acts for constructing or regulating markets and fairs (*f*); in acts authorizing the making of gasworks for supplying towns with gas (*g*); or of waterworks for supplying towns with water (*h*); in acts for the making and improving of harbours, docks and piers (*i*); in acts for paving, draining, cleansing, lighting and improving towns (*k*); and in acts authorizing the making of cemeteries (*l*). In each of these acts enactments are made with respect to various matters usually contained in acts of incorporation for the above purposes; and it is provided that the clauses and provisions of these general acts, save so far as they shall be expressly varied or excepted by any special act, shall apply to every undertaking which shall thereafter be authorized by act of parliament for any of the purposes above referred to. A uniformity is thus given to the constitution of such companies, and the length of the acts of parliament required to establish them has been greatly diminished. A short title, for the convenience of reference, is given to each act. The act first mentioned is called "The Companies Clauses

(*c*) Stat. 8 & 9 Vict. c. 16; extended by stat. 26 & 27 Vict. c. 118; amended by stat. 32 & 33 Vict. c. 48.

(*d*) Stat. 8 & 9 Vict. c. 18; extended by stat. 23 & 24 Vict. c. 106.

(*e*) Stat. 8 & 9 Vict. c. 20; extended by stat. 26 & 27 Vict. c. 92. See also stats. 27 & 28 Vict. c. 120; 27 & 28 Vict. c. 121; 30 & 31 Vict. c. 127; 32 & 33 Vict. c. 114; 33 & 34 Vict. c. 19; and 34 & 35 Vict. c. 78.

(*f*) Stat. 10 & 11 Vict. c. 14.

(*g*) Stat. 10 & 11 Vict. c. 15; amended by stat. 34 & 35 Vict. c. 41. See also stat. 33 & 34 Vict. c. 70.

(*h*) Stat. 10 & 11 Vict. c. 17; extended by stat. 26 & 27 Vict. c. 93. See also stat. 33 & 34 Vict. c. 70.

(*i*) Stat. 10 & 11 Vict. c. 27.

(*k*) Stat. 10 & 11 Vict. c. 34.

(*l*) Stat. 10 & 11 Vict. c. 65.

Consolidation Act, 1845" (*m*); the acts amending it are called "The Companies Clauses Act, 1863" (*n*), and "The Companies Clauses Act, 1869" (*o*); and all the others have similar titles. An act called "The Tramways Act, 1870," has been passed to facilitate the construction and to regulate the working of tramways (*p*).

Companies Clauses Consolidation Act, 1845.

The Companies Clauses Consolidation Act contains provisions with respect to the distribution of the capital of the company into shares, which are to be personal estate, and transmissible as such (*q*); with respect to the transfer of shares, which must be by deed duly stamped, in which the consideration shall be truly stated (*r*), and which cannot take place until the transferor shall have paid all calls for the time being due on every share held by him (*s*); with respect to the transmission of shares by will, intestacy, marriage of a female, &c. (*t*); with respect to the payment of calls (*u*), which may be made payable by instalments (*v*), and the forfeiture of shares for nonpayment of calls (*x*); with respect to the remedies of creditors of the company against the shareholders (*y*), which are confined to the extent of their shares in the capital of the company not then paid up, and may be exercised only in case there cannot be found sufficient property or effects of the company whereon to levy execution (*z*); with respect to the bor-

(*m*) Stat. 8 & 9 Vict. c. 16, s. 4.
(*n*) Stat. 26 & 27 Vict. c. 118.
(*o*) Stat. 32 & 33 Vict. c. 48.
(*p*) Stat. 33 & 34 Vict. c. 78.
(*q*) Stat. 8 & 9 Vict. c. 16, s. 7.
(*r*) Sect. 14.
(*s*) Sect. 16; *Hall* v. *Norfolk Estuary Company*, Q. B., 16 Jur. 149; *Regina* v. *Londonderry and Coleraine Railway Company*, 13 Q. B. 998; *Hubbersty* v. *Manchester, Sheffield and Lincolnshire Railway Company*, 36 L. J., N. S., Q. B. 198; Law Rep. 2 Q. B. 471.
(*t*) Sects. 18, 19.
(*u*) Sects. 21—28; see *Wolverhampton New Waterworks Company* v. *Hawkesford*, 6 C. B., N. S. 336.
(*v*) *Ambergate, &c. Railway Company* v. *Norcliffe*, 6 Ex. Rep. 629.
(*x*) Sects. 29—35.
(*y*) Sect. 36.
(*z*) *Devereux* v. *Kilkenny, &c.*

rowing of money by the company (*a*), the conversion of the borrowed money into capital (*b*), the consolidation of the shares into stock (*c*), general meetings (*d*), the appointment and rotation of directors (*e*), the powers (*f*), proceedings and liabilities of the directors (*g*), the appointment and duties of auditors (*h*), the accountability of the officers of the company (*i*), the keeping of accounts (*k*), the making of dividends (*l*), and of bye laws (*m*), the settlement of disputes by arbitration (*n*), the giving of notices (*o*), the recovery of damages and penalties (*p*), and appeals with respect to such damages or penalties to the quarter sessions (*q*); and, lastly, with respect to affording access to the special act by all parties interested (*r*). The provisions of the other acts are not of a nature to require enumeration.

Inconvenience of unincorporated joint stock companies.

Joint stock companies which had not obtained letters-patent or special acts of incorporation were formerly subjected to very great inconvenience whenever they had occasion to take legal proceedings against any person who happened to be a shareholder. And every shareholder in such companies was subject to the like inconvenience whenever he had occasion to proceed against the company. For such a company, however extensive, was in law merely a partnership; and a partner who owes money to the partnership of which he is

Railway Company, 5 Ex. Rep. 834; *Hitchins* v. *Kilkenny, &c. Railway Company*, 10 C. B. 160; *Nixon* v. *Brownlow*, 3 H. & N. 686.

(*a*) Stat. 8 & 9 Vict. c. 16, ss. 38—55.

(*b*) Sects. 56—60.

(*c*) Sects. 61—64.

(*d*) Sects. 66—80.

(*e*) Sects. 81—89.

(*f*) Sects. 90, 91.

(*g*) Sects. 92—100; *Wilson* v. *West Hartlepool Harbour and Railway Company*, Lds. Js., 11 Jur., N. S. 124; 2 De Gex, J. & S. 475.

(*h*) Sects. 101—108.

(*i*) Sects. 109—114.

(*k*) Sects. 115—119.

(*l*) Sects. 120—123.

(*m*) Sects. 124—127.

(*n*) Sects. 128—134.

(*o*) Sects. 135—139.

(*p*) Sects. 142—158.

(*q*) Sects. 159, 160.

(*r*) Sects. 161, 162.

a member, evidently owes a portion of it to himself according to his interest in the joint stock; and in like manner a partner who is a creditor claims part of his demand against himself. In each case, therefore, an account must be settled before the exact debt or credit of the partner can be ascertained (*s*). In order to obviate the difficulties which thus arose, many joint stock companies obtained special acts of parliament, enabling them to sue and be sued in the name of some officer. And an act of parliament (*t*) was passed empowering the crown to grant, by letters-patent, charters to companies for any trading or other purposes whatsoever, which, without incorporating such companies, would empower them to sue and be sued in the name of some officer appointed and registered for the purpose. This act is still in force, and it contains a valuable provision, empowering the crown to limit, by the letters-patent, the liability of the individual members of the company for its engagements to a given extent per share (*u*). Banking companies, whose shareholders are generally their customers, were peculiarly subject to the inconvenience above referred to in suing and being sued. Accordingly by modern statutes (*x*), all such banking companies as consisted of more than six members were allowed to appoint some public officer who must sue and be sued on behalf of the company (*y*). More recently, however, two acts of parliament were passed, the one incorporating public joint stock companies, the other for providing for the incorporation of

Letters-patent.

Banking companies.

(*s*) See *Richardson* v. *Bank of England*, 4 My. & Cr. 165.

(*t*) Stat. 7 Will. IV. & 1 Vict. c. 73, repealing a former statute for a similar purpose, 4 & 5 Will. IV. c. 94.

(*u*) Stat. 7 Will. IV. & 1 Vict. c. 73, s. 4.

(*x*) Stats. 7 Geo. IV. c. 46, s. 9 *et seq.*; 1 & 2 Vict. c. 96; extended, 3 & 4 Vict. c. 111; made perpetual, 5 & 6 Vict. c. 85; 27 & 28 Vict. c. 32.

(*y*) *Chapman* v. *Milvain*, 5 Ex. Rep. 61; *Steward* v. *Greaves*, 10 Mec. & Wels. 711.

joint stock banks. Each of these acts require some notice.

Joint Stock Companies Registration Act.

The first act was intituled "An Act for the Registration, Incorporation and Regulation of Joint Stock Companies" (*z*). This act applied to every joint stock company established for any commercial purpose, or for any purpose of profit (*a*), or for the purpose of insurance (except banking companies, schools and scientific and literary institutions, and friendly, loan and benefit building societies duly certified and enrolled under the statutes in force respecting such societies (*b*)); and the term "joint stock company" comprehended every partnership whereof the capital was divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners; and also every insurance company, whether of lives, ships, or against fire or storm; and every company for granting or purchasing annuities on lives; and every friendly society insuring to an amount exceeding 200*l.* upon one life or for any one person; and also every partnership which at its formation, or by subsequent admission (except any admission consequent on devolution or other act of law), should consist of more than twenty-five members. But the act did not apply to companies incorporated by statute or charter, nor to companies authorized to sue and be sued in the name of some officer or person (*c*). This act, however, has since been repealed (*d*). It provided for the establishment of a registry office, in which the name and business of every projected company, together with the names, occupations and places of business and residence of the pro-

Now repealed.

Registry office.

(*z*) Stat. 7 & 8 Vict. c. 110, amended by stat. 10 & 11 Vict. c. 78.

(*a*) See *The Queen* v. *Whitmarsh*, 15 Q. B. 600; *Bear* v. *Bromley*, 21 L. Jour. Q. B. 354; 18 Q. B. 271.

(*b*) See *post*.

(*c*) Sect. 2.

(*d*) Stat. 25 & 26 Vict. c. 89.

moters of the company, were required to be registered before they could proceed to make public, whether by way of prospectus, handbill or advertisement, any intention or proposal to form the company (*e*). Further particulars were also to be registered as they should be decided on from time to time (*f*). This registration, however, only enabled the company to act provisionally, and it was therefore termed *provisional registration*. And before the company could act otherwise than provisionally, it was required to obtain a certificate of *complete registration*. This certificate could only be obtained on production of a deed of settlement of the company, according to the form set forth in the act, signed by at least one-fourth in number of the persons who at the date of the deed had become subscribers, and who should hold at least one-fourth of the maximum number of shares in the capital of the company (*g*). This deed was required to be certified by two directors of the company in a given form, and along with it was to be produced a complete abstract or index of the deed, together with a copy of it for registration. Provision was also made for the registration, half-yearly or oftener, of all transfers of shares, and of changes in the names of the shareholders (*h*), and for an annual return of the name and business of every company (*i*). On complete registration being certified the company became *incorporated* (*k*) as from the date of the certificate, by the name of the company as set forth in the deed of settlement, with power to have a common seal, but on which was to be inscribed the name of the company, and with

Provisional registration.

Complete registration.

Incorporation.

(*e*) Stat. 7 & 8 Vict. c. 110, s. 4. See also stat. 10 & 11 Vict. c. 78, s. 7; *Abbott* v. *Rogers*, C. P. 1 Jur., N. S. 804; 16 C. B. 277.

(*f*) Stat. 7 & 8 Vict. c. 110, s. 4; 10 & 11 Vict. c. 78, ss. 4, 5, 6.

(*g*) Stat. 7 & 8 Vict. c. 110, s. 7.

(*h*) Sects. 11—13.

(*i*) Sect. 14.

(*k*) *Banwen Iron Company* v. *Barnett*, 8 C. B. 406.

other powers necessary to the conduct of their affairs (*l*), including a power to hold lands on obtaining a licence for that purpose from the Board of Trade (*m*). Provision was also made for the registry of joint stock companies then existing, and for the alteration of their deeds of settlement in order to comply with the provisions of the act (*n*). The transfer of shares was required to be effected by deed in a given form, to be duly stamped, and in which the full amount of the pecuniary consideration for the sale was to be truly expressed (*o*). But no sale or mortgage of any share was valid until the company had obtained a certificate of complete registration and the subscriber had been duly registered as a shareholder in the Registry Office (*p*); and no transfer could be made if the transferor should not then have paid up the full amount due to the company on every share held by him, unless there were a provision to the contrary in the deed of settlement (*q*). Shareholders in these companies were liable to the creditors of the company, if such creditors had used due diligence to obtain satisfaction by execution against the property of the company; but after the expiration of three years next after any person should have ceased to be a shareholder, his liability ceased (*r*).

Existing companies.

Transfer of shares.

Liability of shareholders.

Banking companies.

Repeal of act.

The act which provided for the incorporation of banking companies was intituled "An Act to regulate Joint Stock Banks in England" (*s*). This act has now been repealed (*t*). The incorporation effected under the provisions of this act was by letters-patent, obtained, on

(*l*) Stat. 7 & 8 Vict. c. 110, s. 25.
(*m*) Stat. 10 & 11 Vict. c. 78, ss. 1, 2, 3.
(*n*) Sects. 58, 59.
(*o*) Sect. 54.
(*p*) Sect. 26; *Ex parte Neilson*, 3 De Gex, M. & G. 556.
(*q*) Sect. 54.
(*r*) Sects. 66—68; *Greenwood's case*, 3 De Gex, M. & G. 459, 478; S. C. 18 Jur. 387.
(*s*) Stat. 7 & 8 Vict. c. 113.
(*t*) Stat. 25 & 26 Vict. c. 89.

petition, from the crown. The petition was referred to the Board of Trade, on whose report a charter was granted to the company (*u*) for a term not exceeding twenty years (*x*). Other provisions were also made for the registration of the company, the transfer of shares, the liability of shareholders, and other matters which it is now unnecessary to state.

Objects of these acts.

The main object of the two statutes above referred to was evidently to give publicity to the names of the real promoters and shareholders of joint stock companies, so that the public might know with whom they were dealing, and that those who reaped the benefit of such undertakings might also bear their proper share of the risk. Another object was to recognize, as legal personages, bodies which before had a legal existence, but had no convenient means of acting or of being acted on. In the same spirit another act of parliament was passed in the same session, "for facilitating the winding-up the affairs of joint stock companies unable to meet their pecuniary engagements" (*y*). By this act all incorporated or privileged companies for any commercial or trading purposes, including banking companies (*z*), and also all joint stock companies within the definition contained in the act for their incorporation (*a*), were made liable to bankruptcy in the same manner as private individuals; but the bankruptcy of the company was not to be construed to be the bankruptcy of any member of the company in his individual capacity (*b*).

Bankruptcy of joint stock companies.

Winding-up acts.

This act, however, was almost entirely superseded by the "Joint Stock Companies Winding-up Act, 1848" (*c*), as amended by the "Joint Stock Companies Winding-up

(*u*) Stat. 7 & 8 Vict. c. 113, s. 3.
(*x*) Sect. 6.
(*y*) Stat. 7 & 8 Vict. c. 111, amended by stat. 20 & 21 Vict. c. 78.
(*z*) Stat. 7 & 8 Vict. c. 113, s. 48.
(*a*) Stat. 7 & 8 Vict. c. 110, s. 2; *ante*, p. 224.
(*b*) Stat. 7 & 8 Vict. c. 111, s. 2.
(*c*) Stat. 11 & 12 Vict. c. 45.

Amendment Act, 1849" (*d*), under which an official manager was appointed, and a list of contributories made out, on whom calls were made from time to time for payment of the debts and liabilities of the company. These acts again did not apply to companies registered under the "Joint Stock Companies Act, 1856" (*e*), by which act, as several times amended (*f*), joint stock companies were regulated, until the passing of the "Companies Act, 1862" (*g*). This act has repealed and consolidated all the former acts relating to joint stock companies.

The Limited Liability Act, 1855.

An act of parliament was passed in 1855 for limiting the liability of members of certain joint stock companies (*h*). Under this act any joint stock company to be formed under the act 7 & 8 Vict. c. 110, other than an assurance company, with a capital to be divided into shares of a nominal value of not less than 10*l.* each, might obtain a certificate of complete registration with limited liability, upon complying with certain conditions. With reference to this act it was remarked in the third edition of the present work (*i*), that it seems that all that can now be expected of an act of parliament is to introduce a principle to be worked out by subsequent amendments; and that it was to be hoped that the principle of limited liability then introduced might by some future act be both more widely extended and more accurately applied. This was afterwards done by the Joint Stock Companies Acts, 1856 (*k*), and 1857 (*l*), and the Joint Stock Banking Companies

(*d*) Stat. 12 & 13 Vict. c. 108, amended by stat. 20 & 21 Vict. c. 78; and see as to Railways, stat. 13 & 14 Vict. c. 83.

(*e*) Stat. 19 & 20 Vict. c. 47, s. 108.

(*f*) Stat. 20 & 21 Vict. c. 14; 20 & 21 Vict. c. 49; 21 & 22 Vict. c. 60; 21 & 22 Vict. c. 91.

(*g*) Stat. 25 & 26 Vict. c. 89; amended by stat. 30 & 31 Vict. c. 131.

(*h*) Stat. 18 & 19 Vict. c. 133.

(*i*) Pp. 182, 183.

(*k*) Stat. 19 & 20 Vict. c. 47.

(*l*) Stat. 20 & 21 Vict. c. 14.

Act, 1857 (*m*), as amended by subsequent acts (*n*), all of which are now repealed and consolidated by the Companies Act, 1862 (*o*), as amended by the Companies Act, 1867 (*p*).

Companies Acts, 1862 and 1867.

Under these acts seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the acts in respect of registration, form an incorporated company, with or without limited liability (*q*). But no banking company claiming to issue notes in the United Kingdom shall be entitled to limited liability in respect of such issue (*r*). Not more than ten persons may carry on the business of banking as partners, unless they are registered under this act, or are formed in pursuance of some other act of parliament or of letters-patent; and no partnership consisting of more than twenty persons can now be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the partnership or by the individual members thereof, unless it be registered as a company under this act, or be formed in pursuance of some other act of parliament, or of letters patent, or be a company engaged in working mines within and subject to the jurisdiction of the Stannaries (*s*). The liability of the members of a company formed under this act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its

Liability may be limited.

(*m*) Stat. 20 & 21 Vict. c. 49.
(*n*) Stat. 20 & 21 Vict. c. 80; 21 & 22 Vict. c. 60; 21 & 22 Vict. c. 91.
(*o*) Stat. 25 & 26 Vict. c. 89.
(*p*) Stat. 30 & 31 Vict. c. 131.
(*q*) Stat. 25 & 26 Vict. c. 89, s. 6.
(*r*) Sect. 182.
(*s*) Sect. 4.

being wound up (*t*). In the former case, the company is said to be limited by shares; and in the latter, to be limited by guarantee. And the Companies Act, 1867, now provides, that the liability of the directors or managers, or managing director of a limited company, may, if so provided by the memorandum of association or fixed by special resolution, be unlimited (*u*).

Company may have directors with unlimited liability.

Memorandum of association of company limited by shares.

The memorandum of association of a company limited by shares must contain the following things:—

1. The name of the company with the addition of the word "limited," as the last word of such name.
2. The part of the United Kingdom in which the registered office of the company is proposed to be situate.
3. The objects for which the company is to be established.
4. A declaration, that the liability of the members is limited.
5. The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount; subject to the following regulations:—
   1. That no subscriber shall take less than one share.
   2. That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes (*x*).

Memorandum of association of company limited by guarantee.

When the company is limited by guarantee, its memorandum of association must contain the first three of the above-mentioned requisites; and, (4), a declaration, that each member undertakes to contribute to the

(*t*) Stat. 25 & 26 Vict. c. 89, s. 7.
(*u*) Stat. 30 & 31 Vict. c. 131, s. 4—8.
(*x*) Stat. 25 & 26 Vict. c. 89, s. 8.

assets of the company, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount (*y*).

Memorandum of association of unlimited company.

If no limit be placed on the liability of the members the company is called an unlimited company, and its memorandum of association must contain only the following things:—

1. The name of the company.
2. The part of the United Kingdom in which the registered office of the company is proposed to be situate.
3. The objects for which the company is to be established (*z*).

Effect of memorandum of association.

The memorandum of association must bear the same stamp as if it were a deed, and must be signed by each subscriber in the presence of and be attested by one witness at the least. When registered, it binds the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in the memorandum a covenant on the part of himself, his heirs, executors and administrators, to observe all the conditions of such memorandum, subject to the provisions of the act (*a*).

No alteration to be made.

No alteration can be made by any company in the conditions contained in its memorandum of

(*y*) Stat. 25 & 26 Vict. c. 89, s. 9.

(*z*) Sect. 10.

(*a*) Sect. 11.

Exception.

association ; except that a company limited by shares may increase its capital by the issue of new shares of such amount as it thinks expedient, or may consolidate and divide its capital into shares of larger amount than its existing shares, or convert its paid-up shares into stock (*b*) ; and except that any company may, with the sanction of a special resolution of the company as after mentioned, and with the approval of the Board of Trade, change its name ; but such change will not affect any of the rights or obligations of the company (*c*). And the Companies Act, 1867, now empowers any company limited by shares to modify by special resolution the conditions of its memorandum of association, so as to reduce its capital, provided the sanction of the court be obtained (*d*). The same act also empowers any company limited by shares to divide its capital or any part thereof into shares of a smaller amount than originally fixed by its memorandum of association ; provided that the proportion between the amount which is paid, and the amount (if any) which is unpaid, on each share of reduced amount, shall be the same as it was in the case of the existing share or shares from which the share of reduced amount is derived (*e*).

Name may be changed.

Power to company to reduce capital.

Subdivision of shares.

The memorandum of association may in the case of a company limited by shares, and must in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers shall deem expedient. These articles must be expressed in separate paragraphs numbered arithmetically. The act contains a Table marked A, in the

Articles of association.

(*b*) Stat. 25 & 26 Vict. c. 89, s. 12.

(*c*) Sect. 13.

(*d*) Stat. 30 & 31 Vict. c. 131, ss. 9—20.

(*e*) Sect. 21.

first schedule thereto, of provisions, all or any of which may be adopted in the articles of association (*f*). The regulations contained in this Table will, if not excluded or modified by the articles, be deemed, so far as they are applicable, to be the regulations of every company limited by shares (*g*). The articles of association must be printed and stamped as if they were contained in a deed, and must be signed and attested in the same manner as the memorandum of association; and when registered, they bind the company and the members thereof to the same extent (*h*). The memorandum and articles, if any, are to be registered by the registrar of joint-stock companies (*i*); and thereupon the company is incorporated, with power to hold lands; and a certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of the act in respect of registration have been complied with (*k*). No company formed for the purpose of promoting art, science, religion, charity or any other like object, not involving the acquisition of gain by the company, or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land: but the Board of Trade may, by licence under the hand of one of their principal or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit (*l*). All shares are to be personal estate (*m*). Every company is required to keep a register of its members (*n*); and every company having a capital divided into shares is required to make out an annual list of its members, with other particulars, and to forward a copy thereof to the regis-

Registration.

Company incorporated.

Shares personal estate.

Register of members.

(*f*) Stat. 25 & 26 Vict. c. 89, s. 14.
(*g*) Sect. 15.
(*h*) Sect. 16.
(*i*) Sect. 17.
(*k*) Sect. 18.
(*l*) Sect. 21.
(*m*) Sect. 22.
(*n*) Sect. 25.

trar of joint-stock companies (*o*). No notice of any trust, expressed, implied or constructive, is to be entered on the register (*p*). And a certificate under the common seal of the company, specifying any shares or stock held by any member, is *primâ facie* evidence of his title to the shares or stock therein specified (*q*). And the register of members is *primâ facie* evidence of any matters by the act directed or authorized to be inserted therein (*r*).

Certificate of shares or stock.

Register evidence.

Every company is bound by the act to have a registered office, to which all communications and notices may be addressed (*s*). And every limited company must keep its name painted or affixed on the outside of every office or place of business of the company, in a conspicuous position, in letters easily legible, and must have its name engraven in legible characters on its seal, and must have its name mentioned in legible characters in all notices, advertisements, bills, notes, indorsements, cheques, orders for money or goods on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company (*t*). But associations not for profit may, by licence of the Board of Trade, be registered with limited liability, without the addition of the word limited to their names (*u*). Every limited company is required to keep a register of all mortgages and charges specifically affecting property of the company (*x*). And every limited banking company, and every insurance company, and deposit, provident or benefit society under the act, is required before it commences business, and afterwards on the first

Registered office.

Name of limited company to be painted up, &c.

Register of mortgages.

(*o*) Stat. 25 & 26 Vict. c. 89, s. 26.
(*p*) Sect. 30.
(*q*) Sect. 31.
(*r*) Sect. 37.
(*s*) Sect. 39.
(*t*) Sect. 41.
(*u*) Stat. 30 & 31 Vict. c. 131, s. 23.
(*x*) Stat. 25 & 26 Vict. c. 89, s. 43.

Monday in February and the first Monday in August in every year, to make a statement of its capital, liabilities and assets in a given form, to be put up in a conspicuous place in the office of the company (*y*).

Power to alter regulations by special resolution.

Subject to the provisions of the act, and to the conditions contained in the memorandum of association, any company formed under the act may, in general meeting from time to time, by passing a special resolution in manner after mentioned, alter all or any of the regulations of the company contained in the articles of association, or in the Table marked A. in the first schedule, where such table is applicable to the company; or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution (*z*).

A special resolution.

A resolution passed by a company under the act is deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given; and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice

(*y*) Stat. 25 & 26 Vict. c. 89, s. 44.

(*z*) Sect. 50. *Hulton* v. *The Scarborough Cliff Hotel Company, Limited*, 2 Drew. & Sm. 521.

has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed: At any such meeting, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour or against the same. Notice of any such meeting shall be deemed to be duly given, and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company. In computing the majority when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company (*a*). A copy of every special resolution must be printed and registered (*b*), and must be annexed to or embodied in every copy of the articles of association that may be issued after the passing of such resolution (*c*).

Contracts, how made.

Contracts on behalf of any company may be made as follows:—

(1.) Any contract which, if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged.

(2.) Any contract which, if made between private persons would be by law required to be in writing and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person

(*a*) Stat. 25 & 26 Vict. c. 89, s. 51.

(*b*) Sect. 53.

(*c*) Sect. 54.

acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged.

(3.) Any contract which, if made between private persons would by law be valid, although made by parol only and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged (*d*).

Transfer of shares.

Shares in joint stock companies are transferred by deed registered at the office of the company. But the Companies Act, 1867, provides, in the case of a company limited by shares, for the issue of share warrants with respect to shares fully paid up, or with respect to stock (*e*); and these warrants entitle the bearer to the shares or stock specified in them, and such shares or stock may be transferred by delivery of the share warrant (*f*).

Share warrants.

Winding-up.

Provision is made for the winding-up of Joint Stock Companies either by the court (*g*) or voluntarily (*h*); and if voluntarily, the winding-up may by the order of the court be subject to its supervision (*i*). And the Joint Stock Companies Arrangement Act, 1870 (*j*), authorizes any compromise or arrangement to be made with the sanction of the court between a company in the course of being wound up and its creditors or any class of such creditors. The court to which this juris-

Joint Stock Companies Arrangement Act, 1870.

(*d*) Stat. 30 & 31 Vict. c. 131, s. 37.

(*e*) Sects. 27—33.

(*f*) Sect. 28.

(*g*) Stat. 25 & 26 Vict. c. 89, ss. 79—128. See also stat. 30 & 31 Vict. c. 131, s. 40.

(*h*) Stat. 25 & 26 Vict. c. 89, ss. 129—146.

(*i*) Sects. 147—152.

(*j*) Stat. 33 & 34 Vict. c. 104.

diction is given is the Court of Chancery, except in the case of mines subject to the jurisdiction of the Stannaries; but where the Court of Chancery makes an order for winding-up a company under the act, it may, if it think fit, direct all subsequent proceedings for winding-up the same to be had in the County Court (*k*). The winding-up is effected by liquidators appointed for that purpose, and who if appointed by the court are styled official liquidators (*l*). All persons liable to contribute to the assets of a company under the act, in the event of its being wound up, are called contributories (*m*). The liability of contributories is regulated by the following rules (*n*):—

Liquidators.

Contributories.

1. No past member shall be liable to contribute to the assets of the company, if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up:
2. No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member:
3. No past member shall be liable to contribute to the assets of the company unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the act:
4. In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member:
5. In the case of a company limited by guarantee, no contribution shall be required from any member

(*k*) Stats. 25 & 26 Vict. c. 89, s. 81; 30 & 31 Vict. c. 131, ss. 41, 42.

(*l*) Stat. 25 & 26 Vict. c. 89, ss. 92—97, 133—144.

(*m*) Sect. 74.

(*n*) Sect. 38.

exceeding the amount of the undertaking entered into on his behalf by the memorandum of association:

6. Nothing in the act contained shall invalidate any provision contained in any policy of insurance or other contract, whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract:

7. No sum due to any member of a company, in his character of a member, by way of dividends, profits or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves.

The Companies Seals Act, 1864.

Acts have since been passed to enable joint-stock companies carrying on business in foreign countries to have official seals to be used in such countries (*o*), and

The Mortgage Debenture Act, 1865.

to enable certain companies to issue mortgage debentures founded on securities upon or affecting lands, rates and other property therein particularized, and to make provision for the registration of such mortgage debentures and securities (*p*).

Life assurance companies.

Life assurance companies are now regulated by the Life Assurance Companies Acts, 1870 to 1872 (*q*).

Sale of shares

Shares in joint stock companies are not *goods, wares*

(*o*) Stat. 27 Vict. c. 19.

(*p*) Stat. 28 & 29 Vict. c. 78, amended by stat. 33 & 34 Vict. c. 20.

(*q*) Stats. 33 & 34 Vict. c. 71; 34 & 35 Vict. c. 58, and 35 & 36 Vict. c. 41.

not within the Statute of Frauds.

or *merchandize* within the 17th section of the Statute of Frauds; so that they do not require a written memorandum for a contract for their sale, when the value exceeds 10*l.*, and the buyer does not accept and receive any part, nor give something in earnest to bind the bargain or in part-payment (*r*). And such shares were not considered to be stock within the meaning of the Stock Jobbing Act above mentioned and now repealed (*s*). But the sale of shares in joint stock banks is now void unless the contract shall set forth in writing the numbers of the shares in the registry of the company, or where there is no register by distinguishing numbers, then the names of the registered proprietors of the shares at the time of making the contract (*t*).

Shares in joint stock banks.

Friendly societies.

Several acts of parliament have been passed for the encouragement of friendly societies, for the mutual relief of their members and their families in case of sickness, old age, death, or other contingencies (*u*); all of which are now consolidated into one act (*v*). The rules of these societies are required to be certified by the registrar of friendly societies, and in whose custody a transcript of the rules of every friendly society is now required to be kept (*x*). And it is now provided that the registrar of friendly societies shall not grant any certificate to any society assuring to any member thereof a certain annuity or superannuation, deferred or imme-

(*r*) *Humble* v. *Mitchell*, 11 Ad. & Ell. 205; *Knight* v. *Barber*, 16 M. & W. 66; *Bowlby* v. *Bell*, 3 C. B. 284. See *ante*, p. 39.

(*s*) *Hewitt* v. *Price*, 4 Man. & Gr. 355; *Williams* v. *Tyre*, 18 Beav. 366; *ante*, p. 212.

(*t*) Stat. 30 Vict. c. 29.

(*u*) Stat. 10 Geo. IV. c. 56, amended by 4 & 5 Will. IV. c. 40; 3 & 4 Vict. c. 73; 9 & 10 Vict. c. 27; 13 & 14 Vict. c. 115; 15 & 16 Vict. c. 65; 16 & 17 Vict. c. 123; 17 & 18 Vict. c. 101.

(*v*) Stat. 18 & 19 Vict. c. 63, amended by stats. 21 & 22 Vict. c. 101; 23 & 24 Vict. c. 58; 30 & 31 Vict. c. 117, and 32 & 33 Vict. c. 61.

(*x*) Stat. 18 & 19 Vict. c. 63, s. 26. A transcript of the rules was formerly required to be inrolled with the clerk of the peace. Stat. 4 & 5 Will. IV. c. 40, s. 4.

diate, unless the table of contributions payable for such kind of assurance shall have been certified under the hand of the actuary to the commissioners for the reduction of the national debt, or by an actuary to some life assurance company in London, Edinburgh, or Dublin who shall have exercised the profession of actuary for at least five years (*y*). On the death or removal of any trustee of one of these societies, the whole property of the society vests in the succeeding trustee for the same estate and interest as the former trustee had therein, and subject to the same trusts, without any assignment or conveyance whatever, except the transfer of stock and securities in the public funds (*z*). And on the death, bankruptcy, or insolvency of any officer of any such society, or on any execution issuing against him, or on his making any assignment or conveyance for the benefit of his creditors, the money or effects in his hands belonging to the society are to be paid over and delivered to the society before any other of his debts are paid (*a*). Acts of parliament have also been passed to legalize the formation of industrial and provident societies for carrying on trades or handicrafts in common (*b*), and many of the provisions which relate to friendly societies apply also to these institutions (*c*). Loan societies are regulated by another act of parliament, which, after having been long periodically continued, is now made perpetual (*d*). Other acts of parliament have recently been passed for the regula-

Industrial and provident societies.

Loan societies.

Savings banks.

(*y*) Stat. 18 & 19 Vict. c. 63, s. 26.

(*z*) Sect. 18.

(*a*) Sect. 23.

(*b*) Stat. 15 & 16 Vict. c. 31, amended by stats. 17 & 18 Vict. c. 25, and 19 & 20 Vict. c. 40; repealed and consolidated by stat. 25 & 26 Vict. c. 87, amended by stat. 30 & 31 Vict. c. 117, and explained and amended by stat. 34 & 35 Vict. c. 80.

(*c*) Stats. 25 & 26 Vict. c. 87, s. 15; 30 & 31 Vict. c. 117, s. 3.

(*d*) Stat. 3 & 4 Vict. c. 110, made perpetual by stat. 26 & 27 Vict. c. 56.

Post office savings banks.

tion of savings banks (*e*); and particularly for the establishment of savings banks in connexion with the post-office (*f*),—banks which, having the security of a government guarantee, are a great boon to the poorer classes. Trades unions are now regulated by the Trade Union Act, 1871 (*g*).

Trades unions.

Building societies.

An act of parliament also exists for the regulation of benefit building societies (*h*). The funds of these societies are raised by monthly contributions of the members, which must not exceed 20*s.* per share, and by fines for non-payment. The shares must not exceed the value of 150*l.* each; but any member may hold more than one share (*i*). When the amount of the shares has been realized, the money is divided amongst the members, and the society is dissolved. Such members, however, as may wish to buy land or to build, may receive the amount of their shares in advance on payment of an additional subscription by way of interest, and also on payment of a bonus for the advance, which of course is deducted from the amount of the share advanced. This bonus is usually determined by competition amongst the members, the shares to be paid in advance being put up by auction by the society; and the subscriptions and fines to become due in respect of the advanced shares are then secured to the society by the purchasers, by mortgage of land or houses of sufficient value (*j*). These mortgages are not

(*e*) Stat. 26 & 27 Vict. c. 87.

(*f*) Stats. 24 Vict. c. 14; 26 Vict. c. 14, and 32 & 33 Vict. c. 59.

(*g*) Stat. 34 & 35 Vict. c. 31.

(*h*) Stat. 6 & 7 Will. IV. c. 32.

(*i*) *Morrison* v. *Glover*, 4 Ex. Rep. 430.

(*j*) See *Mosley* v. *Baker*, 6 Hare, 87; 3 De Gex, M. & G. 1032; *Doe* d. *Morrison* v. *Glover*, 15 Q. B. 103; *Seagrave* v. *Pope*, 1 De Gex, Mac. & Gord. 783; *Fleming* v. *Self*, Kay, 518; 3 De Gex, Mac. & Gord. 997; *Farmer* v. *Smith*, 4 H. & N. 196; *Sparrow* v. *Farmer*, 26 Beav. 511; *Smith* v. *Pilkington*, 1 De Gex, F. & J. 120.

liable to stamp duty (*k*), provided they be made by a member for securing the repayment to the society of money not exceeding five hundred pounds; but in other cases the stamp duty now attaches (*l*). These mortgages were also exempt from any of the forfeitures or penalties formerly in force against usury (*m*). And a receipt for the monies secured, indorsed by the trustees of the society upon any such mortgage, vests the estate comprised in the security in the person entitled to the equity of redemption, without any reconveyance (*n*). Under cover of the Building Societies Act, many societies called freehold land societies have been established for the purpose of buying freehold land and selling it again in lots to the different members; but these societies are not within the scope of the building and friendly societies acts, and can only be certified as such by the concealment of their real object (*o*).

Stamp duty.

Freehold land societies.

An act has also been passed for facilitating the erection of dwelling-houses for the labouring classes (*p*), under which any number of persons, not less than six, may by subscribing articles of association form themselves into a company for the purposes of the act. The articles are to be in a given form, and to be registered by the registrar of joint stock companies. And the Companies Clauses Consolidation Act, 1845, is incorporated into the act, the articles of association being deemed the special act.

The Labourers Dwelling Act, 1855.

(*k*) *Walker* v. *Giles*, 6 C. B. 662; *Williams* v. *Hayward*, 22 Beav. 220.

(*l*) Stat. 31 & 32 Vict. c. 124, s. 11; repealed by stat. 33 & 34 Vict. c. 99, and re-enacted by stat. 33 & 34 Vict. c. 97, s. 112.

(*m*) Stat. 6 & 7 Will. IV. c. 32, s. 2.

(*n*) Sect. 5; *Prosser* v. *Price*, 28 Beav. 68; *Pearse* v. *Jackson*, Law Rep., 3 Ch. Ap. 576.

(*o*) See *Grimes* v. *Harrison*, 26 Beav. 435; *Hughes* v. *Layton*, Q. B., 10 Jur., N. S. 513.

(*p*) Stat. 18 & 19 Vict. c. 132. See also stats. 29 Vict. c. 28; 30 Vict. c. 28, and 31 & 32 Vict. c. 130.

Judgment debts.

The provisions above referred to for charging the stock of any debtor with the payment of any judgment debt (*q*), extend to stock and shares in any *public* company in England, whether incorporated or not (*r*).

Patents.

The prerogative of the crown in the grant of letters-patent is frequently exercised not only for the incorporation of joint stock companies, but also for conferring on private individuals certain exclusive rights and privileges. These rights, called *patents* from the letters-patent which confer them, will be considered in the next chapter.

(*q*) *Ante*, p. 215.

(*r*) Stat. 1 & 2 Vict. c. 110, s. 14. See *Nicholls* v. *Rosewarne*, 6 C. B., N. S. 480.

CHAPTER II.

OF PATENTS AND COPYRIGHTS.

A PATENT is the name usually given to a grant from the crown, by letters-patent, of the exclusive privilege of making, using, exercising and vending some new invention. The granting of such letters-patent is an ancient prerogative of the crown, a prerogative which remains unaffected by the Patent Law Amendment Act, 1852 (*a*). In the reign of Queen Elizabeth this prerogative was stretched far beyond its due limits, and the monopolies thus created formed one of the grievances which King James, her successor, was at last obliged to remedy. Accordingly by a statute passed in the twenty-first year of his reign, and commonly called the Statute of Monopolies (*b*), it was declared and enacted that all such monopolies were altogether contrary to the laws of this realm and so were and should be utterly void and of none effect, and in nowise put in ure or execution. In this statute, however, there are certain exceptions, and particularly one on which the modern law with respect to patents may be said to be founded. This exception is as follows: "Provided also and be it declared and enacted, that any declaration before mentioned shall not extend to any letters-patent and grants of privilege for the term of *fourteen years* or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters-patent and

A patent.

Statute of Monopolies.

Proviso.

(*a*) Stat. 15 & 16 Vict. c. 83; see sect. 16.
(*b*) Stat. 21 Jac. I. c. 3.

grants shall not use, so also they be not contrary to the law or mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters-patent or grant of such privilege hereafter to be made; but that the same shall be of such force as they should be if this act had never been made, and of none other" (*c*).

It will be seen that the granting of letters-patent is not expressly warranted by this statute; but that it merely reserves to such letters-patent as fall within the terms of the exception, such force as they should have had if the act had never been made, and none other force. As, however, all grants of exclusive privilege by letters-patent, which do not fall within this exception, and some others of little importance, are now rendered void by the statute, the construction of this exception has become a matter of great practical importance.

14.

Term of patent fourteen years.

And, first, the term must be *fourteen* years from the date of the letters-patent, or under; and the full term of fourteen years is usually granted. But it is now provided, that all letters-patent for inventions, granted under the provisions of the Patent Law Amendment Act, 1852, shall be made subject to the condition that the same shall be void, and that the powers and privileges thereby granted shall cease, at the expiration of three and seven years respectively from the date thereof, unless there be paid before the expiration of the said three and seven years respectively certain stamp duties mentioned in the act, namely, 50*l.* stamp duty before the expiration of the third year, and 100*l.* stamp duty before the expiration of the seventh year (*d*). These payments appear high, but they are a great improvement on the old law, under which heavy fees and duty

(*c*) Stat. 21 Jac. I. c. 3, s. 6.

(*d*) Stat. 16 & 17 Vict. c. 5, s. 2; *Williams* v. *Frost*, 28 Beav. 93.

were payable on taking out every patent; whereas now, if a patent prove useless, it may be discontinued, and the payment saved. By a modern act of parliament (*e*), a prolongation of the term granted by the original letters-patent may be granted, either to the original grantor or to his assignee (*f*), for a term not exceeding *seven* years after the expiration of the first term in case the Judicial Committee of the Privy Council shall, upon proper application, report to her Majesty, that such further extension of the term should be granted. And if such further period of seven years can be shown to be insufficient for the reimbursement and remuneration of the expense and labour incurred in perfecting the invention, then, by a subsequent statute (*g*), the crown may grant to the inventor, or his assignee, an extension of the patent for any time not exceeding *fourteen* years. Extension of term.

Secondly, the patent must be for "new manufactures within this realm, which others at the time of making such letters-patents and grants shall not use." The *use* here mentioned has been held to mean a use in public; if therefore the invention, for which the patent is sought to be obtained, has been previously used in public within the realm, the patent will be void (*h*). And the *realm* New manufactures.

(*e*) Stat. 5 & 6 Will. IV. c. 83, s. 4, amended by 2 & 3 Vict. c. 67; and extended by stats. 15 & 16 Vict. c. 83, s. 40, and 16 & 17 Vict. c. 115, s. 7.

(*f*) *Russell* v. *Ledsam*, 14 Mee. & Wels. 574; affirmed, 16 M. & W. 633; 1 H. of L. Cas. 687.

(*g*) Stat. 7 & 8 Vict. c. 69, ss. 2, 4, continued by stats. 15 & 16 Vict. c. 83, s. 40, and 16 & 17 Vict. c. 115, s. 7; *In Re Norton's Patent*, P. C., 9 Jur., N. S. 419; 11 W. R. 720; *Re Hill's Patent*, P. C., 9 Jur., N. S. 1209; 12 W. R. 25.

(*h*) *Lewis* v. *Marling*, 10 Barn. & Cress. 22; *Carpenter* v. *Smith*, 9 M. & W. 300; *Re Newall*, 4 C. B., N. S. 269; *Betts* v. *Menzies*, 10 H. of L. Cas. 117; 9 Jur., N. S. 29; *Hills* v. *Liverpool United Gaslight Company*, 9 Jur., N. S. 140; *Harwood* v. *Great Northern Railway Company*, 35 Law Journ. Q. B. 27; *Young* v. *Fernie*, 4 Giff. 577; 10 Jur., N. S. 526.

in this statute has been determined to mean the united kingdom of Great Britain and Ireland; so that when separate letters-patent were granted for England and Scotland, if any invention had been publicly known or practised in England, a patent for Scotland was void (*i*).

By an act of parliament to which we have before referred, it is, however, provided, that letters-patent may be confirmed, or new ones granted, for any invention or supposed invention, which shall have been found by the verdict of a jury, or discovered by the patentee or his assigns, to have been either wholly or in part invented or used before, if the Judicial Committee of the Privy Council, upon examining the matter, shall be satisfied that the patentee believed himself to be the first and original inventor, and that such invention, or part thereof, *had not been publicly and generally used* before the date of the first letters-patent (*k*). It is also now provided by the Patent Law Amendment Act, 1852, that any invention may be used and published for six months from the date of the application for letters-patent for the invention, without prejudice to the letters-patent, provided the *provisional specification*, which describes the nature of the invention, and is to accompany the petition for the letters-patent, be allowed by the proper law officer (*l*). It is also provided that the applicant, instead of having a provisional specification, may, if he think fit, file a complete specification under his hand and seal, particularly describing and ascertaining the nature of his invention, and in what manner the same is to be performed, in which case the invention will be protected for six months from the date of the applica-

Provisional specification.

Specification.

(*i*) *Brown* v. *Annandale*, 8 Cl. & Fin. 214.

(*k*) Stat. 5 & 6 Will. IV. c. 83, s. 2.

(*l*) Stat. 15 & 16 Vict. c. 83, s. 8; *Re Newall*, 4 C. B., N. S. 269; *Re Bates and Redgate*, L. Rep., 4 Ch. Ap. 577; 38 L. J., Chan. 501.

tion, and may be used and published without prejudice to any letters-patent to be granted for the same (*m*). It is also provided, that if any application for letters-patent be made in fraud of the true and first inventor, any letters-patent granted to the true and first inventor, shall not be invalidated by reason of any use or publication of the invention subsequent to such application, and before the expiration of the term of protection (*n*).

True and first inventor.

Thirdly, a patent must be granted "to the true and first inventor and inventors." If therefore the original inventor should sell his secret to another person, such person cannot obtain letters-patent for the invention in his own name; but the original inventor must obtain the letters-patent, and then assign them to the other. If two persons should both make the same discovery, he who first publishes it by obtaining a patent for it, will be the true and first inventor within the meaning of the statute, although he may not actually have been the first to make the discovery (*o*). But a person cannot obtain a patent for an invention which has been communicated to him by another within the realm (*p*). If, however, a person should be in possession of an invention communicated to him from abroad, such person, if he be the first introducer of the invention into this country, is regarded by the law as the true and first inventor thereof within the meaning of the statute of James (*q*); and it is no objection that the patent is taken out in trust merely for the foreign inventor (*r*). But it is now provided that where letters-patent are granted in the United Kingdom for any invention first invented in any

Foreign inventions.

(*m*) Sect. 9. See also stat. 16 & 17 Vict. c. 115, s. 6.

(*n*) Stat. 15 & 16 Vict. c. 83, s. 10.

(*o*) *Boulton* v. *Bull*, 2 H. Black. 487.

(*p*) *Hill* v. *Thompson*, 8 Taunt. 395; S. C. 2 J. B. Moore, 452.

(*q*) *Edgeberry* v. *Stephens*, 2 Salk. 447.

(*r*) *Beard* v. *Egerton*, 3 C. B. 97, 129.

foreign country, or by the subject of any foreign state, and a like privilege for the exclusive use or exercise of such invention in any foreign country is there obtained before the grant of such letters-patent in the United Kingdom, all rights and privileges under such letters-patent shall (notwithstanding any term in such letters-patent limited) cease and be void immediately upon the expiration or other determination of the term of the like privilege obtained in such foreign country; or where more than one such like privilege is obtained abroad, immediately upon the expiration or determination of the term of such privileges which shall first expire or be determined. And no letters-patent granted for any invention, for which any patent or like privilege shall have been obtained in any foreign country, shall be of any validity, if granted after the expiration of the term for which the foreign patent or privilege was in force (*s*). The remaining restrictions imposed by the act of James I. require no comment.

Specification.

The granting of letters-patent is, as has been observed, a prerogative of the crown; and although a patent may now be always obtained for any new invention, yet the grant is still a matter of favour and not of right, and all grants of letters-patent for inventions are at the present day clogged with certain conditions. Of these conditions, the most important is that which requires the inventor particularly to describe and ascertain the nature of his invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, called the specification, and to cause the same to be filed in the High Court of Chancery within a given period, generally six

(*s*) Stat. 15 & 16 Vict. c. 83, s. 25; *Daw* v. *Eley*, V. C. W., 36 L. J., N. S. 482; Law Rep., 3 Eq. 496; *Re Winan's Patent*, Law Rep., 4 P. C. 93; *Re Johnson's Patent*, Law Rep., 4 P. C. 75; *Re Blake's Patent*, Law Rep., 4 P. C. 535.

calendar months from the date (*t*). This instrument was formerly required to be enrolled, instead of being merely filed as at present. And it is provided by the act of 1852 that, if a complete specification be filed along with the petition for the letters-patent, then, in lieu of a condition for making void the letters-patent in case the invention be not described and ascertained by a subsequent specification, the letters-patent shall be conditioned to become void, if such complete specification filed as aforesaid does not particularly describe and ascertain the nature of the invention, and in what manner the same is to be performed (*u*). The object of requiring a specification is to secure to the public the benefit of the knowledge of the invention after the term granted by the patent shall have expired. The framing of the specification is a matter of great nicety; for the description contained in it must correspond with the title of the invention contained in the letters-patent (*v*), and must clearly describe the invention (*w*), neither covering more than the proper subject of the patent (*x*), nor omitting anything necessary to make the description intelligible (*y*). Provision however has been made by an act of parliament before referred to (*z*), for enabling the grantee or assignee of any letters-patent to enter a *disclaimer* of any part either of the title of the invention, or of the specification, stating the reason of such disclaimer, or to enter a memorandum of any alteration in the title or specification, not being

Disclaimer.

(*t*) Stat. 15 & 16 Vict. c. 83, s. 27. See stat. 16 & 17 Vict. c. 115, s. 6. As to munitions of war, see stat. 22 Vict. c. 13.

(*u*) Stat. 15 & 16 Vict. c. 83, s. 9.

(*v*) *Rex* v. *Wheeler*, 2 Barn. & Ald. 345, 350. See *Nickels* v. *Haslam*, 7 Man. & Gran. 378; *Beard* v. *Egerton*, 3 C. B. 97.

(*w*) *Bloxham* v. *Elsee*, 6 Barn. & Cress. 169.

(*x*) *Hill* v. *Thompson*, 3 Meriv. 629.

(*y*) *Rex* v. *Wheeler*, ubi supra; *Neilson* v. *Harford*, 8 Mee. & Wels. 805.

(*z*) Stat. 5 & 6 Will. IV. c. 83, s. 1. See also stat. 7 & 8 Vict. c. 69, ss. 5, 6.

such disclaimer or such alteration as shall extend the exclusive right granted by the patent. Under these provisions, letters-patent originally void may in many cases be rendered valid, the disclaimer being read as part of the original title or specification (*a*). But the object of the act is merely to allow of the removal from the specification of that which is superfluous; and a disclaimer will not be allowed which converts a description, in itself unintelligible or impracticable, into a practicable description of a useful invention (*b*). The above-mentioned provisions have been extended to letters-patent granted and specifications filed under the Patent Law Amendment Act, 1852 (*c*). This act also provides for the printing, publishing and sale, under the direction of the commissioners of patents, of all specifications, disclaimers, and memoranda of alterations deposited or filed under the act (*d*). A "register of patents" is also directed to be kept, where shall be entered and recorded, in chronological order, all letters-patent granted under the act, the deposit or filing of specifications, disclaimers and memoranda of alterations filed in respect of such letters-patent, all amendments in such letters-patent and specifications, all confirmations and extensions of such letters-patent, the expiry, vacating or cancelling of such letters-patent, with the dates thereof respectively, and all other matters and things affecting the validity of such letters-patent as the commissioners may direct; and such register, or a copy thereof, is to be open at all convenient times to the inspection of the public, subject to such regulations as the commissioners may make (*e*).

Register of patents.

(*a*) *The Queen* v. *Mill*, 10 C. B. 379; *Seed* v. *Higgins*, 8 H. of L. Cas. 550; *Ralston* v. *Smith*, 11 H. of L. Cas. 223; *Cannington* v. *Nuttall*, Law Rep., 5 H. of L. 205.

(*b*) *Ralston* v. *Smith*, 11 H. of L. Cas. 223.

(*c*) Stat. 15 & 16 Vict. c. 83, s. 39.

(*d*) Sect. 29.

(*e*) Sect. 34.

Another condition formerly inserted in letters-patent rendered them void, in case the letters-patent, or the liberty and privileges thereby granted, should become vested in or in trust for more than the number of twelve persons, or their representatives, at any one time, as partners, dividing or entitled to divide the benefit or profit obtained by reason thereof; but it is now enacted that, notwithstanding any proviso that may exist in former letters-patent, it shall be lawful for a larger number than twelve persons hereafter to have a legal and beneficial interest in such letters-patent (*f*). Vesting in more than twelve persons.

In letters-patent a clause is usually contained forbidding all persons from using the invention without the consent, licence or agreement of the inventor, his executors, administrators or assigns, in writing, under his or their hands and seals, first had and obtained in that behalf (*g*). The granting of licences to use a patent is one of the most profitable ways of turning it to account. All licences are now required to be registered in the registry to be presently mentioned. Licence to use patent.

Letters-patent obtained in England formerly conferred an exclusive privilege only within England, Wales and the town of Berwick upon Tweed; and also within the islands of Guernsey, Jersey, Alderney, Sark and Man, and her Majesty's colonies and plantations abroad, if so expressed in the patent. In order to obtain the like exclusive privilege for Scotland, it was necessary to obtain separate letters-patent under the seal appointed by the treaty of union to be used instead of the great seal of Scotland; and in the same manner Scotch and Irish patents.

(*f*) Sect. 36. See *post*, the chapter on joint ownership and joint liability.

(*g*) See the form of letters-patent in Appendix (A.)

the like privilege for Ireland was required to be obtained by letters-patent under the great seal for Ireland. But it is now provided that letters-patent shall extend to the whole of the United Kingdom of Great Britain and Ireland, the channel islands, and the Isle of Man; and, in case the warrant for granting the patent shall so direct, such letters-patent shall be made applicable to her Majesty's colonies and plantations abroad, or such of them as may be mentioned in such warrant (*h*). But where separate letters for England, Scotland or Ireland have been already granted, separate letters-patent may still be granted for the other countries, on payment for such country of one-third the stamp duties payable for a patent for the whole kingdom (*i*).

Assignment of letters-patent.

Letters-patent and the privileges thereby granted are freely assignable from one person to another, and the assignee by such assignment is placed in the same position as his assignor previously stood. The assignee may consequently bring in his own name the same actions and suits both at law and in equity against those who have infringed upon the patent as the patentee himself might have done (*k*). The privileges granted by letters-patent are therefore plainly an instance of an incorporeal kind of personal property, different in its nature from a mere *chose in action*, which never has been assignable at law. A deed is said to be necessary for the valid legal assignment of letters-patent; but the author is not aware of any authority for this position; and the general rule appears to be, that the assignment of incorporeal personal pro-

As to the necessity of a deed.

(*h*) Stat. 15 & 16 Vict. c. 83, s. 18.

(*i*) Stat. 16 & 17 Vict. c. 5, s. 4.

(*k*) Godson on Patents, 237; *Walton* v. *Lavater*, 8 C. B., N. S. 162.

perty may be made without deed. Perhaps, however, the necessity of an assignment by deed may be implied from the clause in the letters-patent, which forbids the use of the invention "without the consent, licence or agreement of the inventor, his executors, administrators or assigns, in writing, under his or their hands and seals, first had and obtained in that behalf." All assignments of letters-patent are now required to be registered under the Patent Law Amendment Act, 1852.

Register of proprietors.

The act provides that there shall be kept at the office appointed for filing specifications in chancery under this act, a book or books entitled "The Register of Proprietors," wherein shall be entered, in such manner as the commissioners shall direct, the assignment of any letters-patent, or of any share or interest therein, any licence under letters-patent, and the district to which such licence relates, with the name or names of any person having any share or interest in such letters-patent or licence, the date of his or their acquiring such letters-patent, share and interest, and any other matter or thing relating to or affecting the proprietorship in such letters-patent or licence; and a copy of any entry in such book certified under such seal as may have been appointed, or as may be directed by the Lord Chancellor, to be used in the said office, shall be given to any person requiring the same, on payment of the fees therein provided; and such copies so certified shall be received in evidence, in all courts and in all proceedings, and shall be primâ facie proof of the assignment of such letters-patent, or share or interests therein, or of the licence or proprietorship as therein expressed; provided always, that until such entry shall have been made, the grantee or grantees of the letters-patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters-patent, (*Sic.*)

and of all the licences and privileges thereby given and granted (*l*).

Copyright.

Closely connected with the subject of patents is that of copyright. Copyright may be defined to be the exclusive right of multiplying copies of an original work or composition (*m*). From the nature of this right it must almost necessarily have had its origin at a period subsequent to the invention of the art of printing. It is, however, the better opinion that such a right existed prior to the Statute of Anne (*n*), by which the term of an author's copyright was first limited by the legislature (*o*). But this statute, together with others by which the copyright of authors was further secured (*p*), has been repealed by the act of the present reign to amend the law of copyright, on which the law of copyright now depends (*q*). By this act the copyright of every book (which term includes for the purposes of the act every pamphlet, sheet of letterpress, sheet of music, map, chart or plan) published after the passing of the act in the lifetime of the author shall endure for his natural life, and for the further term of seven years from his death, and shall be the property of such author and his assigns; but if the term of seven years shall expire before the end of forty-two years from the first publication of the book, the copyright shall in that case endure for such period of forty-two years; and the copyright in every book published after the death of its author shall endure for forty-two years from the first publication thereof (*r*). By the same act the existing copy-

Present act.

Extension of existing copyrights.

(*l*) Stat. 15 & 16 Vict. c. 83, s. 35. See *Green's Patent*, 24 Beav. 145; *Chollett* v. *Hoffman*, 7 E. & B. 686; *Hassall* v. *Wright*, Law Rep., 10 Eq. 509.

(*m*) 14 M. & W. 316.

(*n*) 8 Anne, c. 19.

(*o*) *Miller* v. *Taylor*, 4 Burr. 2303; *Donaldson* v. *Beckett*, 4 Burr. 2408; 2 Bro. P. C. 129; *Boosey* v. *Jefferys*, 6 Exch. Rep. 592.

(*p*) Stats. 41 Geo. III. c. 107; 54 Geo. III. c. 156.

(*q*) Stat. 5 & 6 Vict. c. 45.

(*r*) Sect. 3.

right in books then published was extended for the full term provided by the act in the case of books thereafter published. But if the copyright belonged wholly or partly to a publisher or other person, who had acquired it for any other consideration than that of natural love and affection, the copyright was not to be extended by the act, unless the author, if living, or his personal representative if he were dead, and the proprietor of such copyright, should, before the expiration of the subsisting term of copyright, consent and agree to accept the benefits of the act, and should register a minute of such consent in the prescribed form; in which case the copyright should endure for the full term provided by the act, and should be the property of the person or persons expressed in the minute (*s*). And in order to provide against the suppression of books of importance to the public, the Judicial Committee of the Privy Council are authorized, on complaint made to them, that the proprietor of the copyright in any book, after the death of its author, has refused to allow its republication, to grant a licence to the complainant to publish the book in such manner and subject to such conditions as they may think fit (*t*). And with regard to encyclopædias, reviews and other periodical works, it is provided, that the copyright in every article shall belong to the proprietor of the work for the same term as is given by the act to authors of books, whenever any such article shall have been or shall be composed on the terms that the copyright therein shall belong to such proprietor and be paid for by him (*u*); but payment must be actually made by the proprietor before the copyright can vest in him (*x*); and after the term of twenty-eight years from the first publication of any such article, the right of publishing

Encyclopædias, reviews, &c.

(*s*) Stat. 5 & 6 Vict. c. 45, s. 4.
(*t*) Sect. 5.
(*u*) See *Bishop of Hereford* v. *Griffin*, 16 Sim. 190; *Sweet* v. *Benning*, 16 C. B. 459.
(*x*) *Richardson* v. *Gilbert*, 1 Sim., N. S. 336.

the same in a separate form shall revert to the author for the remainder of the term given by the act; and during such term of twenty-eight years the proprietor shall not publish any such article separately without previously obtaining the consent of the author or his assigns. But any author may reserve to himself the right to publish any such composition in a separate form, and he will then be entitled to the copyright in such composition when published separately, without prejudice to the right of the proprietor of the encyclopædia, review or other periodical in which it may have first appeared (*y*). By the same act the sole liberty of representing any dramatic piece at any place of dramatic entertainment, and of performing any musical composition in any public place (*z*), is secured to the author and his assigns for the same term as is provided for the duration of copyright in books (*a*). The property in dramatic works had previously been secured to the authors for a shorter period by an act of the reign of King William the Fourth, which is still in operation (*b*). It is now decided that a foreigner residing abroad is not entitled to the copyright of any work composed by him and first published in this country; but a foreigner residing in England or in a British colony at the time of the first publication of his work is entitled to the copyright (*c*).

Dramatic and musical compositions.

Foreigner.

Registry of proprietors of copyrights.

By the same act a book of registry is required to be kept at Stationers' Hall, open to public inspection on payment of a small fee, in which may be registered the

(*y*) Stat. 5 & 6 Vict. c. 45, s. 18.

(*z*) *Russell* v. *Smith*, 15 Sim. 181; 12 Q. B. 217.

(*a*) Stat. 5 & 6 Vict. c. 45, s. 20.

(*b*) Stat. 3 & 4 Will. IV. c. 15. See *Morton* v. *Copeland*, 16 C. B. 517; *Marsh* v. *Conquest*, 17 C. B., N. S. 418; 12 W. R. 1006; *Laey* v. *Rhys*, 4 Best & Smith, 873.

(*c*) *Jefferys* v. *Boosey*, H. of Lords, 1 Jur., N. S. 615; 4 H. of L. Cas. 815; *Low* v. *Routledge*, V. C. K., 10 Jur., N. S. 922, affirmed 11 Jur., N. S. 939; Law Rep., 3 H. of L. 100.

proprietorship and assignment of copyrights (*d*). And no proprietor of copyright in any book which shall be first published after the passing of the act can maintain any action or suit at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit or proceeding, have caused such book to be registered pursuant to the act; but the omission to register will not affect the copyright in the book, but only the right to sue or proceed in respect of the infringement thereof. And the remedies of the proprietors of the sole liberty of representing any dramatic piece under the above-mentioned act of Will. IV. are not to be prejudiced, although no entry shall be made in the register book (*e*). And every registered proprietor is empowered to assign his interest by making entry in the book of registry of such assignment and of the name and place of abode of the assignee, in the form given in a schedule to the act; and such assignment so entered is declared to be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and to be of the same force and effect as if such assignment had been made by deed (*f*). But if the right of representing any dramatic piece or performing any musical composition is intended to pass to the assignee of the copyright, an entry must be expressly made of such intention (*g*).

Assignment.

The act also expressly provides, that all copyrights protected by the act shall be deemed personal property,

Copyrights to be personal property.

(*d*) Stat. 5 & 6 Vict. c. 45, ss. 11, 13, 19, 20. See *Ex parte Davidson*, 18 C. B. 297; *Ex parte Davidson*, 2 E. & B. 577, *qu.?* The day of first publication must be stated. *Mathieson* v. *Harrod*, V. C. M., Law Rep., 7 Eq. 270; *Page* v. *Wisden*, V. C. M., 17 W. R. 483.

(*e*) Stat. 5 & 6 Vict. c. 45, s. 24.

(*f*) Sect. 13.

(*g*) Sect. 22.

and shall be transmissible by bequest; or, in case of intestacy, shall be subject to the same laws of distribution as other personal property (*h*).

Importation of foreign reprints of books entitled to copyright.

In order to give more effectual protection to persons entitled to the copyright of books, it is also provided that no person, not being the proprietor of the copyright, or some person authorized by him, may import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire any printed book first composed or written or printed and published in any part of the United Kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions (*i*). And by subsequent acts (*j*), books, wherein the copyright is subsisting, first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, are absolutely prohibited to be imported either into the United Kingdom or into the British possessions abroad, provided the proprietor of such copyright, or his agent, shall have given notice in writing to the commissioners of customs that such copyright subsists, and in such notice shall have stated when the copyright will expire. But by another act (*k*) it is provided, that in case the proper legislative authorities in any British possession shall make any act or ordinance to make due provision for securing the rights of British authors in such possession, her Majesty, on the same being transmitted to the Secretary of State, may, if she think fit so to do, express her royal approval of such act or ordinance, and thereupon may issue an order in council declaring that, so long as the provisions of such act or ordinance continue in force within such colony, the prohibitions contained in the above-mentioned acts, or in any other acts,

(*h*) Stat. 5 & 6 Vict. c. 45, s. 25.
(*i*) Sect. 17.
(*j*) Stat. 8 & 9 Vict. c. 93, s. 9; and 16 & 17 Vict. c. 107, ss. 44, 160.
(*k*) Stat. 10 & 11 Vict. c. 95.

with respect to foreign reprints of books first composed, written, printed or published in the United Kingdom, and entitled to copyright therein, shall be suspended so far as regards such colony; and thereupon such act or ordinance shall come into operation, except so far as may be otherwise provided therein, or as may be otherwise directed by such order in council (*l*).

Copyright in prints, maps, &c.

By acts of parliament of an older date, copyright has also been created in prints, engravings, maps, charts and plans for the term of twenty-eight years, to commence from the day of first publishing thereof; which day, together with the proprietor's name, is to be truly engraved on each plate, and printed on every print (*m*). But these acts do not apply to illustrative wood engravings printed on the same sheet as the letter-press of a book, as such engravings form part of the book and are comprised within its copyright (*n*). And as the act to amend the law of copyright (*o*) extends to maps, charts and plans, it has been held that every map, chart or plan must be registered at Stationers' Hall (*p*) before any action or suit can be maintained for infringement of the copyright (*q*). The above mentioned acts empower the assignee of the copyright to bring an action in his own name against any person who may pirate it (*r*). And by a modern statute (*s*) all the provisions contained in these acts are extended to the United

(*l*) Several British colonies have obtained Orders in Council under this act. See 6 Jur., N. S. pt. 2, p. 45.

(*m*) Stat. 8 Geo. II. c. 13, amended by 7 Geo. III. c. 38, and rendered more effectual by 17 Geo. III. c. 57; *Gambart* v. *Sumner*, 5 H. & N. 5; *Gambart* v. *Ball*, 14 C. B., N. S. 306; *Graves* v. *Ashford*, Law Rep., 2 C. P. 410.

(*n*) *Bogue* v. *Houlston*, 5 De Gex & Smale, 267; S. C. 16 Jur. 272.

(*o*) Stat. 5 & 6 Vict. c. 45; *ante*, p. 256.

(*p*) *Ante*, p. 258.

(*q*) *Stannard* v. *Lee*, Law Rep., 6 Ch. Ap. 346. See *Stannard* v. *Harrison*, V. C. B., 19 W. R. 811.

(*r*) *Thompson* v. *Symonds*, 5 T. Rep. 41.

(*s*) Stat. 6 & 7 Will. IV. c. 59, s. 1.

Kingdom of Great Britain and Ireland. And it is provided (*s*), that if any person shall, during the existence of the copyright, engrave, etch or publish any engraving or print of any description whatever, either in whole or in part, already published in any part of Great Britain or Ireland, without the express consent of the proprietor or proprietors thereof first obtained in writing signed by him, her or them respectively, with his, her or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor may, by a separate action upon the case, to be brought against the person so offending, in any court of law in Great Britain or Ireland, recover such damages as the jury shall assess, together with double costs of suit. By a more recent act it is declared that the provisions of the above-mentioned statutes are intended to include prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely (*t*).

Copyright in sculptures, &c.

By other acts of parliament copyright has been granted to the makers of new and original sculptures, models, copies and casts for the term of fourteen years from their first putting forth or publishing the same (*u*), with a further term of fourteen years to the original maker, if he shall be then living (*v*), provided that in every case the proprietor cause his name, with the date, to be put on every such sculpture, model, copy or cast before the same shall be put forth or published (*w*). And it is also provided that no person who shall purchase the right or property of any such sculpture, model, copy or cast of the proprietor, expressed in a deed in

(*s*) Stat. 6 & 7 Will. IV. c. 59, s. 2.

(*t*) Stat. 15 & 16 Vict. c. 12, s. 14.

(*u*) Stat. 38 Geo. III. c. 71, amended by 54 Geo. III. c. 56.

(*v*) Stat. 54 Geo. III. c. 56, s. 6.

(*w*) Sect. 1.

writing signed by him with his own hand, in the presence of and attested by two or more credible witnesses, shall be subject to any action for copying, casting or vending the same (*x*). By the Designs Act, 1850 (*y*), provision has been made for the registration of sculptures, models, copies and casts within the protection of the Sculpture Copyright Acts, which registration entitles the proprietor of the copyright to certain penalties in case of piracy (*z*). And with regard to paintings, drawings and photographs, it is now provided that the exclusive right of copying, engraving, reproducing and multiplying them by any means, and of any size, shall belong to the author, being a British subject or resident within the dominions of the Crown, for the term of his life and seven years after his death (*a*). And a register of proprietors of copyright in paintings, drawings and lithographs is established at Stationers' Hall, subject to similar regulations to that established for the registry of copyright in books (*b*).

Paintings, drawings and photographs.

By an act of parliament recently passed to amend the law of international copyright (*c*), her Majesty is empowered by any order in council to grant the privilege of copyright for such period as shall be defined in such order (not exceeding the term allowed in this country), to the authors, inventors and makers of books, prints, articles of sculpture and other works of art, or any particular class of them, to be defined in such order, which shall, after a future time to be specified in such order,

International copyright.

(*x*) Stat. 54 Geo. III. c. 56, s. 4.

(*y*) Stat. 13 & 14 Vict. c. 104, s. 6.

(*z*) Sect. 7.

(*a*) Stat. 25 & 26 Vict. c. 68, s. 1.

(*b*) Sects 4, 5, *ante*, p. 258; *Ex parte Beal*, 9 B. & S. 395; Law Rep., 3 Q. B. 387; *Graves' case*, Law Rep., 4 Q. B. 715.

(*c*) Stat. 7 & 8 Vict. c. 12, ss. 2, 3, 4, extended to paintings, drawings and photographs by stat. 25 & 26 Vict. c. 68, s. 12.

be first published in any foreign country, to be named in such order. And her Majesty is also empowered (*d*) by any order in council to direct that the authors of dramatic pieces and musical compositions, which shall after a future time to be specified in such order, be first publicly represented or performed in any foreign country to be named in such order, shall have the sole liberty of representing or performing in any part of the British dominions such dramatic pieces or musical compositions during such period as shall be defined in such order, not exceeding the period allowed in this country. Provision however is made for the entry of proper particulars of the subjects for which copyrights shall be granted in the register book of the Stationers' Company in London, within a time to be prescribed in each such order in council (*e*). And all copies of books wherein there shall be any subsisting copyright by virtue of this act, or of any order in council made in pursuance thereof, printed or reprinted in any foreign country, except that in which such books were first published, are absolutely prohibited to be imported into any part of the British dominions, except with the consent of the registered proprietor of the copyright thereof, or his agent authorized in writing (*f*). But no such order in council shall have any effect unless it shall be therein stated, as the ground for issuing the same, that due protection has been secured by the foreign power named in such order in council for the benefit of parties interested in works first published in the dominions of her Majesty, similar to those comprised in such order (*g*). And every such order in council is to be published in the London Gazette as soon as may be after the making thereof, and from the time of such publication shall

(*d*) Stat. 7 & 8 Vict. c. 12, s. 5.
(*e*) Sects. 6, 7, 8, 9; *Cassell* v. *Stiff*, 2 Kay & J. 279.
(*f*) Sect. 10.
(*g*) Sect. 14.

have the same effect as if every part thereof were included in the act (*h*). And no copyright is allowed to any book, dramatic piece, musical composition, print, article of sculpture or other work of art, first published out of her Majesty's dominions, otherwise than under this act. A convention under this act has already been effected with France, the stipulations of which have been confirmed by act of parliament (*i*). And the provisions of the International Copyright Act have been extended to authorized translations of foreign books for a term not exceeding five years from the first publication of such translations (*k*); also to authorized translations of foreign dramatic pieces for a term not exceeding five years from the time at which the authorized translations are first published or publicly represented (*l*), but so as not to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country (*m*).

Newspapers.

No person can print or publish any newspaper before delivering at the Stamp Office a declaration containing, amongst other things, the true name, addition and place of abode of the printer and publisher, and of every proprietor resident out of the United Kingdom, and also of every proprietor resident in the United Kingdom, if their number shall not exceed two, exclusive of the printer and publisher; and if their number should exceed two, then the names of two of the proprietors must be given, the amount of whose shares shall not be less than the share of any other proprietor resident in the United Kingdom, exclusive of the printer and publisher; and the amount of their shares must be specified (*n*). Under this act if one person holds in trust for another, both

(*h*) Stat. 7 & 8 Vict. c. 12, s. 15.
(*i*) Stat. 15 & 16 Vict. c. 12.
(*k*) Sects. 1, 2, 3, 4.
(*l*) Sects. 4, 5.
(*m*) Sect. 6.
(*n*) Stat. 6 & 7 Will. IV. c. 76, s. 6.

names must be mentioned (*o*); and a mortgagee must be mentioned also, otherwise the right to publish the newspaper would formerly have been considered as goods of the mortgagee, in the order and disposition of the mortgagor, and would accordingly, in the event of his bankruptcy, have passed to his assignees (*p*). And this appears to be still the case under the Bankruptcy Act, 1869 (*q*), whenever the mortgagor is a trader.

Designs for articles of manufacture.

By recent statutes a copyright has been granted to designs for articles of manufacture for the term of three years, one year, or nine calendar months, according to the nature of the manufacture (*r*); and, in pursuance of these acts, a registrar of designs for articles of manufacture has been appointed, by whom all designs to be protected by the acts are required to be registered (*s*); and provision is also made for the transfer of the copyright in such designs by any writing purporting to be a transfer, and signed by the proprietor, and also for the registration of transfers in a prescribed form (*t*). These acts have been extended and amended by the Designs Act, 1850 (*u*), which provides for the "provisional registration" of designs for the term of one year, and empowers the Board of Trade to extend the copyright in ornamental designs for such term, not exceeding the additional term of three years, as the board may think

(*o*) *Harmer* v. *Westmacott*, 6 Sim. 284.

(*p*) *Longman* v. *Tripp*, 2 Bos. & Pull. N. Rep. 67; *Ex parte Foss, Re Baldwyn*, 2 De Gex & Jones, 230.

(*q*) Stat. 32 & 33 Vict. c. 71, s. 15, par. (5); *Ex parte Union Bank of Manchester, In re Jackson*, Law Rep., 12 Eq. 354; *ante*, p. 57.

(*r*) Stat. 5 & 6 Vict. c. 100, by which all the previous statutes were consolidated, and 6 & 7 Vict. c. 65; 21 & 22 Vict. c. 70; 24 & 25 Vict. c. 73.

(*s*) Stat. 6 & 7 Vict. c. 65, ss. 7, 8, 9.

(*t*) Stats. 5 & 6 Vict. c. 100, s. 6; 6 & 7 Vict. c. 65, s. 6.

(*u*) Stat. 13 & 14 Vict. c. 104. See also stats. 14 & 15 Vict. c. 8, extended by stat. 15 & 16 Vict. c. 6.

fit (*v*). A more recent statute extends the copyright to certain ornamental designs (*x*), and provides for the registration of any pattern or portion of any article of manufacture instead of a drawing or description (*y*). It also enables proceedings for piracy to be brought in the county court (*z*).

Trade marks.

The marks often used by manufacturers to designate goods made by them resemble copyright as a subject of property (*a*); and the Court of Chancery will restrain a third person from passing off his own goods as those made by another, by the use of that other person's trade mark. And when a business, with the machinery and trade marks, is assigned from one person to another, the assignee has the same right as the assignor had before to prevent others from using the marks (*b*). A trade mark may belong to particular works as well as to particular persons (*c*). But those who themselves deceive the public cannot prevent others from using their marks (*d*). A recent act of parliament has amended the law relating to the fraudulent marking of merchandize (*e*), and has made the forging of trade marks or their wrongful application to articles of merchandize a misdemeanor (*f*). And every person who now contracts to sell any article with any trade mark

New enactment.

(*v*) Stat. 13 & 14 Vict. c. 104, s. 9.

(*x*) Stat. 21 & 22 Vict. c. 70, s. 3.

(*y*) Sect. 5.

(*z*) Sects. 8, 9.

(*a*) *Hall* v. *Barrows*, L. C., 10 Jur., N. S. 55; 4 De Gex, J. & S. 150; *Leather-Cloth Company, Limited*, v. *American Leather-Cloth Company, Limited*, H. of Lords, 13 W. R. 373; 11 Jur., N. S. 513; 11 H. of L. Cas. 523. See, however, *Collins' Company* v. *Brown*, 3 Kay & J. 423.

(*b*) *Edelston* v. *Vick*, 11 Hare, 78.

(*c*) *Motley* v. *Downman*, 3 My. & Cr. 1.

(*d*) *Pidding* v. *How*, 8 Sim. 477; *Perry* v. *Truefitt*, 6 Beav. 66; *Leather-Cloth Company, Limited*, v. *American Leather-Cloth Company, Limited*, 13 W. R. 873; 11 Jur., N. S. 513; 11 H. of L. Cas. 523.

(*e*) Stat. 25 & 26 Vict. c. 88.

(*f*) Sects. 2, 3.

thereon is deemed to warrant that such mark is genuine, unless the contrary be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the purchaser (*g*). And the same provision has been made with respect to any description, statement or other indication of or respecting the number, quantity, measure or weight of any article, or the place or country in which it shall have been made or produced (*h*).

Goodwill.

Connected with the subject of trade marks is that of goodwill. The goodwill of a trade or business is often of great value. It comprises every advantage which has been acquired by carrying on the business, whether connected with the premises in which the business has been carried on, or with the name of the firm by whom it has been conducted (*i*). On the dissolution of a partnership, each partner has a right, in the absence of any stipulation to the contrary, to use the name of the old firm (*k*); and if there be a stipulation that, in case of the decease of one partner the surviving partner shall take the stock or capital at a valuation, the goodwill must be included in such valuation (*l*). The sale of the goodwill of a business will not prevent the vendor from setting up the same business on his own account, even in immediate proximity to the premises on which the old business has been carried on (*m*); so that the purchaser should, in such cases, always insist on a covenant being entered into by a vendor not to carry on the business within so many miles of the old premises,

(*g*) Stat. 25 & 26 Vict. c. 88, s. 19.

(*h*) Sect. 20.

(*i*) *Churton* v. *Douglas*, Johnson, 174.

(*k*) *Banks* v. *Gibson*, M. R., 11 Jur., N. S. 680; 34 L. J., Chan. 179; 13 W. R. 1012; 34 Beav. 566.

(*l*) *Hall* v. *Barrows*, M. R., 9 Jur., N. S. 483, affirmed by L. C., 10 Jur., N. S. 55.

(*m*) *Cruttwell* v. *Lye*, 17 Ves. 335; *Hall* v. *Barrows*, *Churton* v. *Douglas*, ubi supra.

which covenant, as we have seen (*n*), is valid. And in a recent case, where the goodwill of a partnership business was ordered to be sold by the Court, a notice was directed to be inserted in the advertisements and particulars of sale, that the sale would not prevent any person theretofore interested in the business from carrying on the like business in the same town (*o*).

(*n*) *Ante*, p. 97.
(*o*) *Johnson* v. *Helleley*, 2 De Gex, J. & S. 446.

PART IV.

OF PERSONAL ESTATE GENERALLY.

CHAPTER I.

OF SETTLEMENTS OF PERSONAL PROPERTY.

No estate for life.

PERSONAL property is capable of being settled, but not in the same manner as land. Land, being held by estates, is settled by means of life estates being given to some persons, with estates in remainder in tail and in fee simple to others. But personal property, as we have already observed (*a*), is essentially the subject of absolute ownership. The settlement of such property, by the creation of estates in it, cannot therefore be accomplished. And there is a striking difference in many cases between the effect of the same limitation, according as it may be applied to real or to personal property.

As there can be no estate in personal property, it follows that there can be no such thing as an estate for life in such property in the strict meaning of the phrase. Thus, if any chattel, whether real or personal, be assigned to A. for his life, A. will at once become entitled in law to the whole. By the assignment the property in the chattel passes to him, and the law knows nothing of a reversion in such chattel remaining in the assignor. And this is the case even though the chattel be a term of years of such length (for instance 1,000 years) that A. could not possibly live so long (*b*). The

(*a*) *Ante*, p. 7.

(*b*) 2 Prest. Abs. 5.

term is considered in law as an indivisible chattel, and consequently incapable of any such modification of ownership as is contained in a life estate.

Bequest of a term for life.

An apparent exception to the above rule has long been established in the case of a bequest by will of a term of years to a person for his life: in this case the intention of the testator is carried into effect by the application of a doctrine similar to that of executory devises of real estates (*c*). The whole term of years is considered as vesting in the legatee for life, in the same manner as under an assignment by deed; but on his decease the term is held to shift away from him, and to vest, by way of *executory bequest*, in the person to be next entitled (*d*). Accordingly, if a term of years be bequeated to A. for his life, and after his decease to B., A. will have, during his life, the whole term vested in him, and B. will have no vested estate, but a mere *possibility*, as it is termed (*e*), until after the decease of A.; and this possibility, like the possibility of obtaining a real estate, was formerly inalienable at law unless by will (*f*), though capable of assignment in equity (*g*). But by the act to amend the law of real property (*h*), which repeals an act of the previous session passed for the same purpose (*i*), it is provided that an executory and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure may be disposed of by deed. B. may, therefore, during

Executory bequests.

Possibility.

How alienable.

(*c*) See Principles of the Law of Real Property, 249, 2nd ed.; 256, 3rd ed.; 259, 4th ed.; 270, 5th ed.; 284, 6th ed.; 292, 7th ed.; 301, 8th ed.; 299, 9th ed.; 301, 10th ed.

(*d*) *Matthew Manning's case*, 8 Rep. 95; *Lampert's case*, 10 Rep. 47.

(*e*) See Principles of the Law of Real Property, 223, 2nd ed.; 230, 3rd ed.; 231, 4th ed.; 240, 5th ed.; 250, 6th ed.; 256, 7th ed.; 267, 8th ed.; 266, 9th ed.; 268, 10th ed.

(*f*) Shep. Touch. 230.

(*g*) Fearne, Cont. Rem. 548.

(*h*) Stat. 8 & 9 Vict. c. 106, s. 6.

(*i*) Stat. 7 & 8 Vict. c. 76, s. 5.

the life of A., assign his expectancy by deed; and such assignment will entitle the assignee to the whole term on A.'s decease. If, however, no such assignment should have been made, B. will become, on the decease of A., possessed of the whole term, which will then shift to B. by virtue of the executory bequest in his favour. The mere circumstance, indeed, of the term being bequeathed to A. for his life only, will operate to shift away the term on his decease (*j*), independently of the bequest to B.; so that, if there had been no bequest over to B., the interest of A. would continue only during his life, and the residue of the term would then remain part of the undisposed of property of the testator. It may, however, be doubted whether the doctrine of executory bequests is applicable in law to any other chattels than chattels real (*k*).

Life interests in equity.

The strict and ancient doctrine of the indivisibility of a chattel, though still retained by the courts of law, has no place in the modern Court of Chancery, which, in administering equity, carries out to the utmost the intentions of the parties. In equity, therefore, under a gift of personal property of any kind to A. for his life, and after his decease to B., A. is merely entitled to a life interest, and B. has, during the life of A., a vested interest in remainder, of which he may dispose at his pleasure, and the Court of Chancery will compel the person to whom the courts of law may have awarded the legal interest to make good the disposition. Accordingly, if the personal property so given should consist of moveable goods, equity will compel A., the owner for life, to furnish and sign an inventory of the goods, and an undertaking to take proper care of

(*j*) *Eyres* v. *Faulkland*, 1 Salk. 231; *Ker* v. *Lord Dungannon*, 1 Dru. & War. 509, 528. See, however, 1 Jarm. Wills. 793; 747, 2nd ed.; *Hoare* v. *Parker*, 2 T. Rep. 376.

(*k*) Fearne, Cont. Rem. 413.

them (*l*). This doctrine, however, is comparatively of modern date; for formerly the Court of Chancery followed the rules of law in the construction of such gifts; and if a gift of moveable goods had been made to A. for his life, and after his decease to B., they would not have afforded to B. any assistance after A.'s decease (*m*). But if the gift had been of the *use or enjoyment* of the goods only to A. for his life, and after his decease to B., the court would then have assisted B. by declaring A.'s representatives after his decease to be trustees only for the benefit of B. (*n*). But this distinction is now exploded; and the only case in which the tenant for life is now entitled absolutely to things given to him for life is, that of articles *quæ ipso usu consumuntur*, as wines, &c., a gift of which to a person for his life vests in him the absolute ownership (*o*). In all other cases, as we have said, modern equity will assist the donee in remainder, to whom any gift of personal estate may be made after the decease of another who is to have them only for his life (*p*). When, therefore, it is wished to make a settlement of any kind of personal property, the doctrine of the Court of Chancery is at once resorted to. The property is assigned to trustees, *in trust* for A. for his life, and after his decease *in trust* for B., &c. This assignment to the trustees vests in them the whole legal interest in the property; and in a court of law they are held to be absolutely entitled to it; for the Statute of Uses (*q*) has no application to any kind of personal estate. But in equity the trustees are compellable to pay the entire income to A. for his life, and after his decease to B., and so on according to the

Ancient distinction between a gift of goods and a gift of the use of goods.

Articles quæ ipso usu consumuntur.

Settlement of personal property by means of trusts.

(*l*) Fearne, Cont. Rem. 407; *Conduitt* v. *Soane*, 1 Coll. 285.

(*m*) Fearne, Cont. Rem. 402.

(*n*) Ibid. 404.

(*o*) *Randall* v. *Russell*, 3 Meriv. 190; *Andrew* v. *Andrew*, 1 Coll. 690.

(*p*) Fearne, Cont. Rem. 406.

(*q*) 27 Hen. VIII. c. 10; Principles of the Law of Real Property, 126, 2nd ed.; 131, 3rd and 4th eds.; 136, 5th ed.; 142, 6th ed.; 146, 7th ed.; 152, 8th ed.; 153, 9th ed.; 154, 10th ed.

trusts of the settlement; and if B. should alien his interest during the life of A., the trustees will be bound, on having notice of the disposition, to stand possessed of the property, after A.'s decease, in trust for the alienee (*r*).

Bonus.

When shares in joint stock companies are settled in the manner above mentioned, it sometimes becomes a question whether any extraordinary profit which may be divided amongst the shareholders by way of bonus should be considered as capital or as interest. The equitable tenant for life is too frequently inclined to consider himself entitled to any bonus in the same manner as to ordinary dividends. The Court of Chancery, however, usually considers every bonus, whether consisting of additional joint stock or shares (*s*), or simply of money (*t*), as part of the capital, unless it appear to be nothing more than an increased dividend arising from the increased profits of the year (*u*). In the absence, therefore, of any special provision to the contrary, every bonus ought to be invested upon the trusts of the settlement, and the income only paid to the tenant for life.

Apportionment of income.

The law respecting the apportionment of income between a remainder man and the representatives of a tenant for life and otherwise now depends on the Apportionment Act, 1870 (*x*), to be presently explained. An act of the reign of King William the

(*r*) A form of marriage settlement of stock and other personal estate upon the usual trusts will be found in Appendix (B).

(*s*) *Brander* v. *Brander*, 4 Ves. 800; *Hooper* v. *Rossiter*, 13 Price, 774; S. C., M'Cleland, 527.

(*t*) *Paris* v. *Paris*, 10 Ves. 185; *Ward* v. *Combe*, 7 Sim. 634. See also *Gilly* v. *Burley*, 22 Beav. 619, 624, and the cases there collected.

(*u*) *Barclay* v. *Wainewright*, 14 Ves. 66; *Price* v. *Anderson*, 15 Sim. 473; *Preston* v. *Melville*, 16 Sim. 163; *Maclaren* v. *Stainton*, 3 De Gex, F. & J. 202.

(*x*) Stat. 33 & 34 Vict. c. 35.

Fourth (*y*), provided that on the decease of a person entitled to a life interest in any income, made payable or coming due at fixed periods, of any property, whether real or personal, his executors or administrators should recover from the remainderman an apportioned part of the next payment of the income, according to the time which should have elapsed since the last period of payment, up to and including the day of the decease of such person. And when any other limited interest determined, a similar right to an apportionment was also given. But the act made no apportionment of rent between the heir or devisee and the executor of a tenant in fee simple (*z*). Where the property ceased with the interest, and did not go over to another, as in the case of a life annuity, the act was decided still to apply (*a*). The act extended only to instruments executed, and wills coming into operation after the passing of the act, which took place on the 16th June, 1834 (*b*); and its provisions did not apply to any case in which it was expressly stipulated that no apportionment should take place, or to annual sums made payable in policies of assurance of any description (*c*). Previously to this act no apportionment was made of annuities, or of the dividends of stock settled in trust for one person for life, with remainder to another; but the remainderman was entitled to the whole of the annuity or dividend which fell due next after the decease of the person entitled for life (*d*). But in a case where the tenant for

Stat. 4 & 5 Will. 4, c. 22.

Previous law.

(*y*) Stat. 4 & 5 Will. IV. c. 22, s. 2; *Re Maxwell's Trusts*, V.-C. W., 9 Jur., N. S. 350; 1 Hem. & Mill. 610.

(*z*) *Brown* v. *Amyot*, 3 Hare, 173, 183; *Beer* v. *Beer*, C. P. 16 Jur. 223, 225; 12 C. B. 60; *Re Clulow*, 3 Kay & J. 689.

(*a*) *Carter* v. *Taggart*, 16 Sim. 447; *Trimmer* v. *Danby*, V.-C. K., 23 L. J., Chan. 979; *Sutton* v. *Ennis*, M. R. Ir., 18 W. R. 882.

(*b*) *Michell* v. *Michell*, 4 Beav. 549; *Knight* v. *Boughton*, 12 Beav. 312; *Wardroper* v. *Cutfield*, V.-C. K., 10 Jur., N. S. 194.

(*c*) Stat. 4 & 5 Will. IV. c. 22, s. 3.

(*d*) *Pearly* v. *Smith*, 3 Atk. 260; *Sherrard* v. *Sherrard*, 3

life of stock died on the day on which a half-year's dividend became due, it was held that it belonged to his personal estate (*e*). If an annuity were given for the maintenance of an infant (*f*), or of a married woman living separate from her husband (*g*), the necessity of the case was considered a ground for presuming that an apportionment was intended. The interest of money lent was also always apportioned; for though the payment of such interest be made half-yearly, yet it becomes due *de die in diem*, so long as the principal remains unpaid (*h*). And the Apportionment Act, 1870 (*i*), now provides that, from and after the passing of that act, all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly (*k*). The apportioned part of any such rent, annuity, dividend or other payment shall be payable or recoverable, in the case of a continuing rent, annuity or other such payment, when the entire portion, of which such apportioned part shall form part, shall become due and payable, and not before; and in the case of a rent, annuity or other such payment determined by re-entry, death or otherwise, when the next entire portion of the same would have been payable, if the same had not so determined, and not before (*l*). All persons and their respective heirs, executors, administrators and assigns,

Annuity given for maintenance.

Interest was always apportioned.

The apportionment Act, 1870.

Atk. 502; *Warden* v. *Ashburner*, 2 De Gex & Smale, 366; *The Queen* v. *The Lords of the Treasury*, 16 Q. B. 357.

(*e*) *Paton* v. *Sheppard*, 10 Sim. 186.

(*f*) *Hay* v. *Palmer*, 2 P. Wms. 501; 1 Swanst. 349, note.

(*g*) *Howell* v. *Hanforth*, 2 W. Black. 1016.

(*h*) *Edwards* v. *Countess of Warwick*, 2 P. Wms. 176; *Banner* v. *Lowe*, 13 Ves. 135; *Re Rogers's Trusts*, 1 D. & S. 339.

(*i*) Stat. 33 & 34 Vict. c. 35, passed on the 1st August, 1870.

(*k*) Sect. 2.

(*l*) Sect. 3.

and also the executors, administrators and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid, when payable (allowing proportionate parts of all just allowances), as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively. Provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure and the same lands or other hereditaments shall not be resorted to for any such apportioned part, forming part of an entire and continuing rent as aforesaid, specifically; but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under the act or otherwise, would have been entitled to such entire or continuing rent; and such apportioned part shall be recoverable from such heir or other person by the executors, or other parties entitled under the act to the same, by action at law or suit in equity (*m*).

Meaning of word "dividends."

The word "dividends" includes, besides dividends strictly so called, all payments made by the name of dividend, bonus or otherwise, out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of the act, be deemed to have accrued, by equal daily increment, during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made. But the word "dividend" does not include payments in the nature of a return or reimbursement of capital (*n*). Nothing in the act con-

(*m*) Stat. 33 & 34 Vict. c. 35, s. 4.

(*n*) Sect. 5. See *Jones* v. *Ogle*, L. C. & LL. J., 21 W. R. 236.

tained is to render apportionable any annual sums made payable in policies of assurance of any description (*o*). And the provisions of the act are not to extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place (*p*). This act, it will be observed, extends the rule of apportionment to the case of a deceased person absolutely entitled to property, giving to his executors or administrators a right, as against his heir or devisee or specific legatee, to an apportioned part of the income up to the time of his decease.

No estate tail in personal property.

An estate tail, such as that created by a gift of lands to a man and the heirs of his body (*q*), has nothing analogous to it in personal property. An estate tail cannot be held in such property at law, neither does equity admit of any similar interest. A gift of personal property of any kind to A. and the heirs of his body will simply vest in him the property given (*r*). And in the construction of wills, where many informal expressions are allowed to vest an estate tail in lands, the general rule is, that expressions, which if applied to real estate would confer an estate tail, shall, when applied to personal property, simply give the absolute interest (*s*). The same effect will be produced by a gift of such property to a man and his heirs. The words "heirs," and "heirs of his body," are quite inapplicable to personal estate; the heir, as heir, has nothing to do with the personal property of his ancestor. Such property has nothing hereditary in its nature, but simply belongs to its owner for the time being. Hence, a gift of personal property to A. simply, without more, is sufficient to

Word "heirs" inapplicable to personal estate.

A simple gift sufficient.

(*o*) Stat. 33 & 34 Vict. c. 35, s. 6.

(*p*) Sect. 7.

(*q*) See Principles of the Law of Real Property, 28, 2nd ed.; 30, 3rd and 4th eds.; 33, 5th, 6th, 7th and 8th eds.; 34, 9th and 10th eds.

(*r*) Fearne, Cont. Rem. 461, 463; *Doncaster* v. *Doncaster*, 3 Kay & J. 26.

(*s*) 2 Jarm. Wills, ch. 41, p. 534, 3rd ed.

vest in him the absolute interest (*t*). Whilst, under the very same words, he would acquire a life interest only in real estate (*u*), he will become absolutely entitled to personal property. Thus a gift of lands to A. for life, and after his decease to B., gives to B. a mere life interest in remainder expectant on the decease of A. (*x*); unless indeed the gift be by will under the act for the amendment of the laws with respect to wills (*y*). But a gift of personal property to A. for life, and after his decease to B., gives to B. a vested equitable interest in the corpus or body of the fund, to which he becomes absolutely entitled, subject only to A.'s life interest; and the circumstance of B.'s dying in the lifetime of A. would be immaterial (*z*).

Example.

It is true that in deeds and other legal instruments it is usual to transfer personal estate absolutely, by the use of the words "executors, administrators and assigns." As real estate is conveyed to a man, his heirs and assigns (*a*), so personal property is assigned to him, his executors, administrators and assigns. The executor or administrator is, as we shall see, the person who becomes legally entitled to a man's personal estate after his decease; in the same manner that a man's heir or assign becomes entitled to his real property. But the analogy extends no further. There is no necessity for the use of these terms (*b*) as there is for the employment of the

Use of the words "executors, administrators and assigns."

(*t*) *Byng* v. *Lord Strafford*, 5 Beav. 558.

(*u*) Principles of the Law of Real Property, 17, 114, 2nd ed.; 18, 119, 3rd and 4th eds.; 18, 125, 5th ed.; 18, 131, 6th ed.; 18, 134, 7th ed.; 19, 140, 8th and 9th eds.; 141, 10th ed.

(*x*) *Goodtitle* d. *Richards* v. *Edmonds*, 7 T. Rep. 635.

(*y*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 28.

(*z*) *Benyon* v. *Maddison*, 2 Bro. C. C. 75.

(*a*) Principles of the Law of Real Property, 115, 2nd ed.; 120, 3rd and 4th eds.; 126, 5th ed.; 132, 6th ed.; 135, 7th ed.; 141, 8th and 9th eds.; 142, 10th ed.

(*b*) *Elliott* v. *Davenport*, 1 P. Wms. 84. See *Earl of Lonsdale* v. *Countess of Berchtoldt*, Kay, 646.

word "heirs." These terms, however, are constantly employed in conveyancing as words of limitation of an absolute interest; and a rule has sprung up with respect to their construction similar to the rule in Shelley's case, by which the word "heirs," when following a life estate given to the ancestor, is merely a word of limitation, giving to such ancestor an estate in fee (*c*). Thus, if money or stock be settled in trust for A. for life, and after his decease in trust for his executors, administrators and assigns, A. will be simply entitled absolutely (*d*); in the same manner as a gift of lands to A. for his life, with remainder to his heirs and assigns, gives him an estate in fee simple. But as the rule, so far as it applies to personal property, is not founded on the same strict principle as the rule in Shelley's case, a gift of such property to the executors or administrators (not adding assigns) of a person who has taken a previous life interest is sometimes construed as giving him no further interest in such property (*e*); whilst, under the same circumstances, the word "heirs" in a gift of real estate would have given him the fee simple.

Rule in Shelley's case.

As no estates can subsist in personal property, it follows that the rules, on which contingent remainders in freehold lands depend for their existence, have never had any application to contingent dispositions of personal property. Such dispositions partake rather of the indestructible nature of executory devises and shifting uses. Thus a gift of lands to A. for his life, and after

Rules as to contingent remainders do not apply to contingent dispositions of personal property.

(*c*) See the Principles of the Law of Real Property, 207, 2nd ed.; 214, 3rd ed.; 215, 4th ed.; 224, 5th ed.; 234, 6th ed.; 240, 7th ed.; 250, 8th ed.; 249, 9th ed.; 251, 10th ed.

(*d*) Co. Litt. 54 b; *Hames* v. *Hames*, 2 Keen, 646; *Grafftey* v. *Humpage*, 1 Beav. 46; *Howell* v. *Gayler*, 5 Beav. 157; *Meryon* v. *Collett*, 8 Beav. 386; *Morris* v. *Howes*, 4 Hare, 599; *Mackenzie* v. *Mackenzie*, 3 Mac. & Gord. 559.

(*e*) *Wallis* v. *Taylor*, 8 Sim. 241; see 1 Beav. 52; *Daniel* v. *Dudley*, 1 Phi. 1; *Attorney-General* v. *Malkin*, 2 Phi. 61; *Alger* v. *Parrott*, V.-C. W., Law Rep., 3 Eq. 328.

his decease to such son of A. as shall first attain the age of twenty-one years, creates a contingent remainder, which will fail in the event of no son of A. having attained the prescribed age at the time of his decease (*f*). The reason of this failure depends on the ancient rule, that there must always be some defined owner of the feudal possession; and, consequently, between the time of the death of A. and the time of his son's attaining the age of twenty-one years, some owner of the freehold ought to have been appointed, in whom the feudal possession might continue (*g*). Personal property, however, has evidently nothing to do with these feudal rules relating to possession. If, therefore, a gift be made of personal property to trustees, in trust for A. for his life, and after his decease, in trust for such son of A. as shall first attain the age of twenty-one years; or if a term of years be bequeathed to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-one years; it will be immaterial whether or not the son attain the age of twenty-one years in the lifetime of his father. On his attaining that age, he will become entitled quite independently of his father's interest. His ownership will spring up, as it were, on the given event of his attaining the age. But as the indestructible nature of these future dispositions of personal estate might lead to trusts of indefinite duration, the rule of perpetuities, which confines executory interests within a life or lives in being, and twenty-one years afterwards, with a further allowance for the time of gestation, should it exist (*h*), applies equally to personal as to real estate. And the

Limit to future dispositions.

Restraint on accumulation.

(*f*) *Festing* v. *Allen*, 12 Mee. & Wels. 279; 5 Hare, 573; *Holmes* v. *Prescott*, V.-C. W., 10 Jur., N. S. 507; 12 W. R. 636.

(*g*) Principles of the Law of Real Property, 209, 1st ed.; 217, 2nd ed.; 224, 3rd and 4th eds.; 233, 5th ed.; 246, 6th ed.; 250, 7th ed.; 259, 8th and 9th eds.; 261, 10th ed.

(*h*) Principles of the Law of Real Property, 242, 1st ed.; 251, 2nd ed.; 259, 3rd ed.; 262, 4th ed.; 272, 5th ed.; 286, 6th ed.; 294, 7th ed.; 305, 8th ed.; 304, 9th ed.; 306, 10th ed.

further restriction on the accumulation of income imposed by the Thellusson Act (*i*), applies to trusts for the accumulation of the income of personal estate as well as real.

Powers.

Equitable interests in personal property of a future kind may be created through the instrumentality of powers, in a similar manner, and to the same extent, as future estates in land (*k*). Thus stock in the funds may be vested in trustees upon such trusts as B. shall by any deed or by his will appoint, and, in default of and until any such appointment, in trust for C., or upon any other trusts. Here C. will have a vested interest in the stock, subject to be divested or destroyed by B.'s exercising his power of appointment; and B., though not owner of the stock, has power to dispose of it by deed or will, and may if he please appoint to himself; in which case the trustees will be bound to transfer it to him. If the power should not be exercised by B., C. will then be entitled absolutely; and will not, as was formerly the case with respect to landed property, be subject to judgment debts incurred by B. (*l*), or to any other of his debts. But if B. should exercise his power by deed without valuable consideration, or by will, in favour of a third person, the stock so appointed would be considered in equity as part of the assets of B. the appointor, and would be subject to the demands of his creditors in preference to the claim of the appointee (*m*).

If power is exercised without valuable consideration, the property appointed is subject to debts of appointor.

(*i*) Stat. 39 & 40 Geo. III. c. 98; Principles of the Law of Real Property, 243, 1st ed.; 253, 2nd ed.; 260, 3rd ed.; 263, 4th ed.; 274, 5th ed.; 288, 6th ed.; 295, 7th ed.; 307, 8th ed.; 306, 9th ed.; 308, 10th ed.

(*k*) See Principles of the Law of Real Property, 231 *et seq.* 1st ed.; 236, 2nd ed.; 243, 3rd ed.; 245, 4th ed.; 255, 5th ed.; 266, 6th ed.; 272, 7th ed.; 283, 8th ed.; 282, 9th ed.; 284, 10th ed.

(*l*) Ibid.

(*m*) *Lassells* v. *Cornwallis*, 2 Vern. 465; *Bainton* v. *Ward*, 2 Atk. 172. The doctrine applies also to appointments of real estate. See *Fleming* v. *Buchanan*, 3 De Gex, M. & G. 976.

Bankruptcy.

In case of bankruptcy, it was provided by the former acts (*n*) that all powers vested in the bankrupt, which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), might be executed by the assignees for the benefit of the creditors in the same manner as the bankrupt might have executed the same. And by the Bankruptcy Act, 1869, such powers may now be exercised by the trustee for the creditors (*o*).

Rules respecting powers over real estate apply to powers over personal property.

The rules respecting the necessity of a compliance with the terms and formalities of the power, whenever it is exercised otherwise than by will (*p*), and the relief afforded by the Court of Chancery on the defective exercise of a power (*q*), apply as well to personal as to real property. Powers over personal estate may also be exercised by women, without their husbands' consent, and also in favour of their husbands, in the same manner as powers over land (*r*); and the provision of the recent Wills Act, which requires wills made in exercise of powers to be executed and attested like all other wills (*s*), applies equally to powers over personal estate. A general bequest of personal estate will also now include any personal estate which the testator may have only a *power* to appoint as he may think fit in the same

(*n*) Stat. 12 & 13 Vict. c. 106, s. 147, repealing stat. 6 Geo. IV. c. 16, s. 77, to the same effect, and now repealed by stat. 32 & 33 Vict. c. 83.

(*o*) Stat. 32 & 33 Vict. c. 71, ss. 15, par. (4); 25, par. (5).

(*p*) See Principles of the Law of Real Property, 238, 2nd ed.; 245, 3rd ed.; 247, 4th ed.; 257, 5th ed.; 268, 6th ed.; 274, 7th ed.; 285, 8th ed.; 284, 9th ed.; 286, 10th ed. See now as to deeds, stat. 22 & 23 Vict. c. 35, s. 12.

(*q*) Ibid. 239, 2nd ed.; 246, 3rd ed.; 248, 4th ed.; 258, 5th ed.; 269, 6th ed.; 276, 7th ed.; 287, 8th ed.; 286, 9th ed.; 288, 10th ed.

(*r*) Ibid. 241, 2nd ed.; 248, 3rd ed.; 250, 4th ed.; 260, 5th ed.; 271, 6th ed.; 278, 7th ed.; 289, 8th ed.; 288, 9th ed.; 290, 10th ed.

(*s*) Ibid. 240, 2nd ed.; 247, 3rd ed.; 249, 4th ed.; 259, 5th ed.; 271, 6th ed.; 277, 7th ed.; 288, 8th ed.; 287, 9th ed.; 289, 10th ed.

manner as a general devise of real estate will comprise real estate subject to any such power (*t*).

Appointment of children's portions.

A frequent instance of the employment of a power over personalty occurs in the case of children's portions, which are usually settled on all the children equally, subject to a power given to the parents to appoint the shares in a different manner. When such a power is exercised, the shares previously vested in the children are divested from them, and new shares are vested in them by the operation of the power. Formerly, if such a power were so worded as not to authorize an exclusive appointment to some or one of the children, it was held by the Court of Chancery, as a rule of equity, that each child ought to have a substantial share; and an appointment to any child of a very small share was called an *illusory appointment*, and was held void (*u*). But this doctrine having given rise to difficulties and family disputes, from the uncertainty of the question what was too small or what a sufficient share, the meddlesome doctrine of equity on this point was a few years ago abolished by act of parliament (*x*); and now the appointment of any share, however small, cannot be set aside on the ground of its being illusory. The act extends, as did the doctrine, to real estate as well as personal; but landed property is, from its nature, seldom cut up into little portions.

Illusory appointments.

The doctrine of equity now abolished.

Exclusive appointment, when void.

Although no appointment is now void for being illusory, yet where an exclusive appointment is not authorized, any appointment, by which any object of the

(*t*) See Principles of the Law of Real Property, 242, 2nd ed.; 249, 3rd ed.; 251, 4th ed.; 261, 5th ed.; 273, 6th ed.; 279, 7th ed.; 291, 8th ed.; 289, 9th ed.; 292, 10th ed.

(*u*) 1 Sugd. Pow. 568 *et seq.*; 449, 8th ed.; Chance on Powers, 396 *et seq.*

(*x*) Stat. 11 Geo. IV. & 1 Will. IV. c. 46, 16th July, 1830.

power would be entirely excluded, is still void. Thus, if 1,000*l.* be given to A., B. and C. in such shares as their father shall appoint, and in default of appointment to them equally, an appointment of 900*l.* to A. would now be good, as 100*l.* would remain to be equally divided between the three (*y*), of which B. and C. would get each one-third (*z*). But a subsequent appointment of the remaining 100*l.* to B. would be void, as altogether excluding C., who is equally an object of the power (*a*). It is customary, however, in modern settlements to give to parents a power of appointment in favour of any one or more of the children exclusively of the others. And in order that those to whom appointments have been made should not obtain more than may have been intended for them, it is generally provided that no child taking any share of the fund under any appointment shall be entitled to any share in the part unappointed without bringing his or her share into *hotchpot*, and accounting for the same accordingly. Under such a provision, A., in the instance above given, would not be entitled to any share in the 100*l.* unappointed, without also agreeing to a like division of his 900*l.* amongst himself and the others. The clause of hotchpot operates favourably to the representatives of those children who may happen to die before any appointment shall have been made to them. For when a power is given to appoint amongst children, no appointment can be made to the executors or administrators of those who may have died (*b*); so that such executors or administrators cannot possibly take more than the aliquot part given

Hotchpot.

No appointment can be made to executors or administrators of deceased objects.

(*y*) *Young* v. *Waterpark*, 13 Sim. 202.

(*z*) *Wilson* v. *Piggott*, 2 Ves. jun. 351; *Wombwell* v. *Hanrott*, 14 Beav. 143. See *Foster* v. *Cautley*, 6 De Gex, M. & G. 55.

(*a*) 2 Ves. jun. 355.

(*b*) *Boyle* v. *The Bishop of Peterborough*, 1 Ves. jun. 299; *Ricketts* v. *Loftus*, 4 You. & Coll. 519.

to the deceased child in default of any appointment; whilst they may be partially or totally excluded even from that by a partial or complete exercise of the power of appointment in favour of the surviving children, or even of a single survivor. When the appointment is partial only, the executors or administrator of a deceased child will, under the hotchpot clause, divide the fund unappointed with the other children, to whom no appointment may have been made; whereas, without such a clause, the children to whom appointments may have been made would be equally entitled to participate in the part unappointed (*c*).

Appointment amongst a class.

When a power is given to appoint property amongst a particular class, no portion of the fund can be appointed in favour of any person who is not a member of that class; and any appointment to such person will accordingly be void. Thus, if the power be to appoint

Children.

the property to all or any of the *children* of the appointor in such manner as he may think fit, no interest in the property can be appointed to any *grandchild* of the appointor; for a grandchild is not an object of

Nephews.

the power (*d*). So if the power be to appoint amongst nephews or grandnephews, those only can take any

Younger children.

shares who answer that description (*e*). Again, if the power be to appoint portions amongst younger children, nothing can be taken by a younger son who afterwards becomes the eldest by the decease of his elder brother (*f*), although if he should have actually received

(*c*) *Wilson* v. *Piggott*, 2 Ves. jun. 351; *Wombwell* v. *Hanrott*, 14 Beav. 143; *Walmsley* v. *Vaughan*, 1 De Gex & Jones, 114.

(*d*) *Alexander* v. *Alexander*, 2 Ves. sen. 640; *Bristow* v. *Warde*, 2 Ves. jun. 336.

(*e*) *Falkner* v. *Butler*, Amb. 514; *Waring* v. *Lee*, 8 Beav. 247.

(*f*) *Chadwick* v. *Doleman*, Vern. 528; *Lord Teynham* v. *Webb*, 2 Ves. sen. 198; *Gray* v. *Earl of Limerick*, 2 De Gex & Smale, 370. See *Sandeman* v. *Mackenzie*, 1 John. & H. 613.

any share in the money whilst a younger son, he will not be obliged to refund it on becoming the eldest (*g*). The word "younger," however, is not, in parental provisions (*h*), taken literally, but as meaning any child who may not be entitled to the family estate. Therefore a daughter, who may be the eldest child, would be considered as a proper object of a power to appoint amongst the younger children, whilst her younger brother, being the eldest son entitled to the family estate, would not be allowed to participate (*i*). And in the same manner a second son becoming the eldest, but not obtaining the family estate, would be allowed a share (*k*). A power to appoint amongst children living at their father's decease includes a child *en ventre sa mère* (*l*).

Child *en ventre sa mère.*

In some cases where the power only authorizes an appointment amongst children, an appointment in favour of the issue of a child may be sustained as being, in effect, first an appointment to the child, and then an assignment by such child in favour of his issue (*m*). But this of course can only be done when the child is of age, and is a party to and executes the deed by which the appointment is made. And the more regular plan in such cases is, for the father first to make the appointment in favour of the child, and then for the child to make an assignment of the fund appointed to trustees in trust for his children in the manner intended.

When an appointment to the issue of a child is good.

An appointment by a father in favour of his child, in

Appointment

(*g*) 2 Sugd. Pow. 293; 680, 8th ed.

(*h*) *Hall* v. *Hewer*, Amb. 203; *Lyddon* v. *Ellison*, 19 Beav. 565.

(*i*) *Pierson* v. *Garnet*, 2 Bro. C. C. 38; *Heneage* v. *Hunloke*, 2 Atk. 456; *Beale* v. *Beale*, 1 P. Wms. 244.

(*k*) *Spencer* v. *Spencer*, 8 Sim. 87; *Macoubrey* v. *Jones*, 2 Kay & J. 684; *Sing* v. *Leslie*, 2 Hem. & Mil. 68.

(*l*) *Beale* v. *Beale*, 1 P. Wms. 244.

(*m*) *Routledge* v. *Dorril*, 2 Ves. jun. 357; *West* v. *Berney*, 1 Russ. & My. 431, 439; *Goldsmid* v. *Goldsmid*, 2 Hare, 187; *Limbard* v. *Grote*, 1 Mylne & Keen, 1.

by a father must not be for his own benefit.

exercise of a power for that purpose, ought to be made for the benefit of the child who is the object of the provision, and not indirectly for the benefit of the father who makes the appointment or of any other person. Accordingly, any exercise of the power under a bargain for or even with a view to the benefit of the appointor, or of any other person than one of the objects of the power, will be considered as, in technical phrase, a fraud on the power and will be void (*n*). But when there is no evidence that the appointment is made under a bargain for the benefit of the father, although there may be strong suspicion that such is the case, the appointment cannot be set aside (*o*). Powers of appointment amongst children usually enable the parent to fix the age or time at which the fund appointed shall vest in any child. But, on the principle just stated, a father will not be allowed to make an immediate appointment to an infant child, for the sake of becoming himself entitled to the fund appointed, as the child's personal representative in the event of its decease (*p*). An appointment to an infant is not, however, necessarily void on account of the circumstance that the father, who has made the appointment, will become entitled to the property appointed in the event of the child's decease (*q*).

Fraud on the power.

Perpetuity to be avoided in the exercise of powers.

In the exercise of powers of appointment amongst children, care should be taken not to postpone the

(*n*) *Daubeney* v. *Cockburn*, 1 Meriv. 626; *Palmer* v. *Wheeler*, 2 Ball & Beatty, 18; *Jackson* v. *Jackson*, 1 Dru. 91; *Thompson* v. *Simpson*, 2 Jones & Lat. 110; *Topham* v. *Duke of Portland*, 1 De Gex, Jones & Smith, 517; 11 H. of L. Rep. 32; *Pryor* v. *Pryor*, 2 De Gex, J. &S. 205.

(*o*) *M'Queen* v. *Farquhar*, 11 Ves. 467; *Hamilton* v. *Kirwan*, 2 Jones & Lat. 393; *Campbell* v. *Home*, 1 You. & Coll. N. C. 664.

(*p*) *Cunynghame* v. *Thurlow*, 1 Russ. & M. 436; *Lord Sandwich's case*, cited 11 Ves. 479; *Gee* v. *Gurney*, 2 Coll. 486.

(*q*) *Butcher* v. *Jackson*, 14 Sim. 444; *Fearon* v. *Desbrisay*, 14 Beav. 635.

vesting of their shares to a period which may exceed the limits allowed by the law of perpetuity (*r*). When the power of appointment is a general power, enabling the appointor to make a disposition in favour of any object he may please, the property is evidently not tied up so long as such a power exists over it; and neither the reason nor the rule which forbids a perpetuity has any application till some settlement is made in exercise of such a power. In such a case, therefore, the limits of perpetuity commence from the time of the appointment (*s*). But where the power of appointment is to be exercised only in favour of a particular class of objects, the property subject to the power is evidently already tied up in favour of that class. The limits of perpetuity are therefore in this case to be reckoned, not from the time of the exercise of the power, but from the date of its creation. The interests given by the power must, for this purpose, be regarded as if they had been inserted in the settlement by which the power was created; and if such interests would have been too remote, if inserted in the original settlement, they will be too remote when given in exercise of the power (*t*). Thus a person having a general power of appointment by will over a fund, may by his will appoint a share of it in favour of any unborn child of his own, to be vested in such child on his attaining the age of twenty-three years. The limit of perpetuities is reckoned from the time of the appointment, which in this case is the death of the appointor, when his will begins to take effect. The child must necessarily then be born, or in *ventre sa mère*, and the child's life is accordingly the life then in being within which the share must necessarily vest. But if by a marriage settlement a fund be settled in trust for the father for his life, and

(*r*) See *ante*, p. 281.

(*s*) 1 Sugd. Pow. 249, 495; 395, 8th ed.

(*t*) Co. Litt. 271 b, n. (1), vii. 2; 1 Sugd. Pow. 498; 396, 8th ed.; *Routledge* v. *Dorril*, 2 Ves. jun. 357.

after his decease in trust for the children, in such shares as he shall appoint by his will, he cannot make an appointment in favour of any unborn child, to be vested on his attaining the age of twenty-three years. For in this case the limit of perpetuities counts from the date of the settlement, when the property was first tied up for the benefit of the children; and this limit would be exceeded if the child should not attain the given age within twenty-one years after the decease of the father, who was the life in being at the date of the settlement. And the rule is, that every limitation which *may* exceed in duration a life or lives in being, and twenty-one years afterwards (allowing for the period of actual gestation), is void as tending to a perpetuity (*u*).

The courts lean to vested interests.

When personal property is directed to be paid to any persons at a future time, the leaning of the courts is always in favour of vested interests; that is to say, the courts lean to that construction which will give to the parties a present assignable and transmissible right to that which is not payable till a future time. Thus if a legacy be given to a person to be payable when he attains the age of twenty-one years, the legacy is considered to be immediately vested, and will accordingly be payable to the administrator of the legatee in case he should die under age (*x*). So if personal estate be settled in trust for A. for life, and after his decease for all his children in equal shares, each of his children will be entitled to a share, whether such child survive his parent or not, and although such child should die in infancy (*y*). If, however, the property should consist of money charged on

Vesting of portions charged on land.

(*u*) See Principles of the Law of Real Property, 242, 1st ed.; 251, 2nd ed.; 259, 3rd ed.; 273, 5th ed.; 287, 6th ed.; 294, 7th ed.; 305, 8th ed.; 304, 9th ed.; 306, 10th ed.

(*x*) 2 Black. Comm. 513; Co. Litt. 237 a, note (1).

(*y*) *Skey* v. *Barnes*, 3 Mer. 335; *Templeton* v. *Warrington*, 13 Sim. 267. See *Swallow* v. *Binns*, 1 Kay & John. 417.

land or other real estate, such as the portions of younger children when the family estate is entailed on the eldest son, the rule is different; and if any of the children should die before the time when his or her portion becomes payable, it will, in the absence of special provision to the contrary, sink into the land for the benefit of the estate (*z*).

Vesting of interests given to children.

In the settlement of personal property upon children there are two plans, either of which may be adopted with respect to the vesting of the interests given. The one plan is, to vest the interests of the children in them immediately as they come into being, divesting from each of them proportionate shares as others are born, and also divesting the shares altogether in favour of the others, in the event of the decease of any son under age, or of any daughter under age and without having been married. The other plan is, to vest the interests given only in those who, being sons, attain the age of twenty-one years, or, being daughters, attain that age or marry under it. So far as the corpus of the fund is concerned, the result of each of these plans is the same, the property being ultimately divided only amongst those children who, being sons, live to come of age, or, being daughters, come of age or previously marry. But with regard to the income of the fund the plans are different. In the first case, the income belongs to the children whilst under age; but in the second no interest either in the income or in the principal is given during minority, or, in the case of daughters, until marriage under age. In the first case, therefore, if the father be dead, the income will be payable to the guardian of the children toward their maintenance and education; but in the second case there will be no provision for these purposes in the absence of express directions. Such directions therefore

Maintenance and education.

(*z*) Co. Litt. 237 a, n. (1). See *Evans* v. *Scott*, 1 H. of L. Cases, 43, 57.

should in such case be always inserted, with a provision for the accumulation of the surplus income by way of increase of the principal. If however the whole property is ultimately to go amongst the children (*a*), or if the persons entitled, in the event of the children not living to attain vested interests, should agree (*b*), the Court of Chancery will direct the income to be applied for the children's maintenance in the absence of sufficient provision for that purpose, and even in the face of an express direction to accumulate the income (*c*).

New enactments as to maintenance.

And a recent act of parliament now provides that, in all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant *may be entitled* in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not; and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen: provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising

(*a*) *Haley* v. *Bannister*, 4 Mad. 275; *Errat* v. *Barlow*, 14 Ves. 202.

(*b*) *Turner* v. *Turner*, 4 Sim. 430; *Cannings* v. *Flower*, 7 Sim. 523.

(*c*) *Greenwell* v. *Greenwell*, 5 Ves. 194.

in the then current year (*d*). This enactment applies only to deeds executed, and wills executed or confirmed or revived by codicil executed after the passing of the act, which took place on the 28th of August, 1860 (*e*). The act, it will be observed, applies only to income to which the infant may be entitled; so that if the infant should not be entitled to the income irrespectively of the act, it would scarcely be safe for the trustees to apply it for the infant's maintenance without express authority.

Maintenance of children in their father's lifetime.

In marriage settlements a life interest is usually and properly given to the father and mother, so that no provision is required for the maintenance of the children until after the decease of the survivor. And where life interests are not given to the parents, but provision is made for the maintenance of the children during the father's lifetime out of the settled fund, such provision is considered as primarily applicable for the maintenance of the children accordingly (*f*). But the general rule is, that every father is bound to maintain his children, if of ability so to do (*g*); and a provision contained in a gift to an infant child, for his maintenance and education, will not be applied for that purpose during his father's lifetime, if the father is able to maintain him in a manner suitable to his condition and prospects (*h*). When, therefore, it is intended that the income of property given to children should be applied to their maintenance during their father's lifetime, without reference to his ability to maintain them, the application of the

(*d*) Stat. 23 & 24 Vict. c. 145, s. 26.

(*e*) Sect. 34.

(*f*) *Stocken* v. *Stocken*, 4 Sim. 152; *Meacher* v. *Younge*, 2 Myl. & K. 490; *Ransome* v. *Burgess*, V.-C. K., Law Rep., 3 Eq. 773. See *Thompson* v. *Griffin*, 1 Craig & Phillips, 317.

(*g*) *Andrews* v. *Partington*, 3 Bro. C. C. 60.

(*h*) *Maberley* v. *Turton*, 14 Ves. 499; *Jervoise* v. *Silk*, G. Cooper, 52; *Ex parte Williams*, 2 Collyer, 740.

income, without reference to his ability, should be expressly directed; and, if such application be so directed, the income must of course be applied accordingly (*i*).

When two funds are provided for maintenance.

When two funds are provided for the maintenance of an infant, it is frequently difficult to decide to which fund recourse should be first had. The general rule is, that the interest of the infant determines the order of application (*k*); but, in order to avoid questions, it is very desirable, when two funds are provided for an infant's maintenance, to direct that one of them shall be in aid only of the provision afforded by the other.

New enactment.

But the act to which we have just referred gives, as we have seen (*l*), a discretion to the trustees to apply the income of the infant's property for his maintenance, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not.

Married women.

The Married Women's Property Act, 1870 (*m*), now provides that a married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children; provided that nothing in the act shall relieve her husband from any liability at present imposed upon him by law to maintain her children.

Investment of settled funds.

In settlements of personal property, it has long been usual to provide for the investment of the fund settled in the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England or Wales, but not in Ireland; and at the present day investments in railway debentures, pre-

(*i*) See *Wetherell* v. *Wilson*, 1 Keen, 80; *White* v. *Grane*, 18 Beav. 571.

(*k*) *Fuljambe* v. *Willoughby*, 2 Sim. & Stu. 165; *Lygon* v. *Lord Coventry*, 14 Sim. 41.

(*l*) *Ante*, p. 292.

(*m*) Stat. 33 & 34 Vict. c. 93, s. 14.

ference shares and other securities yielding a larger income, are often authorized. Government securities, as distinguished from stocks or funds, seem to be nothing else than Exchequer bills, in which trustees appear to be justified, even without express authority, in investing the property for any temporary purpose, as during the necessary delay in completing a contemplated mortgage security (*n*). But where a permanent investment is intended, a trust to lay out money in government securities will not authorize the purchase of Exchequer bills (*o*). Real security means the mortgage of real estate, namely, freehold or copyhold hereditaments of sufficient value (*p*). And if it be desired that the trustees should have power to invest the trust money on mortgage of leasehold estates, or in railway debentures (*q*), or shares, or any other securities, or to lend it to any person on his bond, express authority ought to be given to the trustees for the purpose. But the Improvement of Land Act, 1864, now provides, that all trustees, directors and other persons who may be directed or authorized to invest any money on real security shall (unless the contrary be provided by the instrument directing or authorizing such investments) have power at their discretion to invest money in the charges authorized by that act, or on mortgages thereof (*r*). And it is further provided, that no charge on land made by any absolute order of the Inclosure Commissioners by virtue of that act shall be deemed such

Government securities.

Real security.

The Improvement of Land Act, 1864.

(*n*) *Matthews* v. *Brise*, 6 Beav. 239, 244.

(*o*) *Ex parte Chaplin*, 8 You. & Coll. 397; as to the issue of Exchequer Bills, *see* stat. 24 Vict. c. 5.

(*p*) See *Stickney* v. *Sewell*, 1 My. & Cr. 8; *Phillipson* v. *Gatty*, 7 Hare, 516; *Mant* v. *Leith*, 15 Beav. 524; *Drosier* v. *Brereton*, 15 Beav. 221. Turnpike bonds are real securities for some purposes; *Robinson* v. *Robinson*, Lords Justices, 1 De Gex, Mac. & Gord. 247, 262.

(*q*) *Mortimore* v. *Mortimore*, 4 De Gex & Jones, 472.

(*r*) Stat. 27 & 28 Vict. c. 114, s. 60.

an incumbrance as shall preclude a trustee of money, with power to invest the same in the purchase of land or on mortgage, from investing it in a purchase or upon a mortgage of the land so charged, unless the terms of his trust or power expressly provide that the land to be so purchased or taken in mortgage be not subject to any prior charge (*s*). Investments in Ireland were often expressly prohibited, on account of an act of parliament, which empowered trustees, who were authorized by their trust to lend money at interest on real securities in England, Wales or Great Britain, to lend the same at interest on real securities in Ireland (*t*). But all loans of money on real securities in Ireland under the act, in which any minor or unborn child, or person of unsound mind, might be interested, were required to be made by the direction and under the authority of the Court of Chancery in England, to be obtained in any cause or upon petition in a summary way (*u*); and every such loan was to be made with the consent of the person or persons, if any, whose consent might be required as to the investment of such money upon real securities in England, Wales or Great Britain, testified in the manner required by the trust (*x*). And it was also provided that the act should not apply to cases where there was an express restriction against the investment of the trust money on securities in Ireland (*y*). A recent statute now provides, that when a trustee, executor or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom, or on the stock of

Real securities in Ireland.

New enactment.

(*s*) Stat. 27 & 28 Vict. c. 114, s. 61.

(*t*) Stat. 4 & 5 Will. IV. c. 29. Leaseholds for lives perpetually renewable at a head rent form real securities in Ireland; *Macleod* v. *Annesley*, 16 Beav. 600.

(*u*) Stat. 4 & 5 Will. IV. c. 29, s. 2; *Ex parte French*, 7 Sim. 510; *Ex parte Lord William Purlett*, 1 Phill. 570; *Norris* v. *Wright*, 14 Beav. 291.

(*x*) Sect. 4.

(*y*) Sect. 5.

the Bank of England or Ireland, or on East India Stock, it shall be lawful for such trustee, executor or administrator to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investments shall in other respects be reasonable and proper (*z*). This provision has been made retrospective by act of parliament (*a*). And by a subsequent act of parliament the term "East India Stock," as above used, has been explained to mean as well East India Stock then existing as East India Stock charged on the revenues of India and created under any act or acts of parliament which subsequently received the royal assent (*b*). A further enactment empowers the making of general orders from time to time as to the investment of cash under the control of the Court of Chancery, and for the conversion of any 3*l.* per Cent. Bank Annuities, standing in the name formerly of the accountant-general of the Court of Chancery and now of the paymaster-general, in trust in any cause or matter, into any stocks, funds, or securities, upon which by any such general order cash under the control of the court may be invested (*c*). And when any such general order shall have been made, trustees, executors or administrators, having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds or securities, or any of them, may invest such trust funds or any part thereof in any of the stocks, funds or securities, in or upon which, by such general order, cash under the control of the court may from time to time be invested (*d*). In pursuance of this

Meaning of "East India Stock."

General orders may be made for investment.

(*z*) Stat. 22 & 23 Vict. c. 35, s. 32. As to East India Stock, see *Mortimer* v. *Picton*, 4 De Gex, J. & S. 166.

(*a*) Stat. 23 & 24 Vict. c. 38, s. 12; *Cockburn* v. *Peel*, 3 De Gex, Fisher & Jones, 170; *Hume* v. *Richardson*, 4 De Gex, F. & J. 29.

(*b*) Stat. 30 & 31 Vict. c. 132.

(*c*) Stats. 23 & 24 Vict. c. 38, s. 10; 35 & 36 Vict. c. 44, *ante*, p. 216, n. (*p*).

(*d*) Stat. 23 & 24 Vict. c. 38, s. 11.

General order.

enactment a general order has been made dated the 1st of February, 1861, authorizing the investment of cash under the control of the court in Bank Stock, East India Stock, Exchequer Bills, and 2*l.* 10*s.* per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated 3*l.* per Cent. Annuities, Reduced 3*l.* per Cent. Annuities, and New 3*l.* per Cent. Annuities (*e*). The Debenture Stock Act, 1871 (*f*), enables trustees, who may be empowered to invest trust funds in the mortgages or bonds of any railway or other company, to invest the same, unless the contrary is expressed in the instrument creating the power, in the debenture stock of any such company.

The Debenture Stock Act, 1871.

Further enactment.

A further enactment authorizes trustees, having trust money in their hands which it is their duty to invest at interest, at their discretion to invest the same in any of the parliamentary stocks or public funds, or in government securities, and at their discretion to call in any trust funds invested in any other securities, and to invest the same on any such securities as aforesaid, and also from time to time at their discretion to vary any such investments as aforesaid for others of the same nature; provided that no such original investment as aforesaid (except in the 3*l.* per Cent. Consolidated Bank Annuities), and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person (*g*). This last enactment, however, like the other provisions in the same act, extends only to persons acting under a deed

Power to vary investments.

(*e*) See *Equitable Reversionary Interest Society* v. *Fuller*, 1 John. & Hem. 379; *Re Langford*, 2 John. & Hem. 458; *Re Warde*, 2 John. & Hem. 191.

(*f*) Stat. 34 Vict. c. 27.

(*g*) Stat. 23 & 24 Vict. c. 145, s. 25.

executed, or a will executed or confirmed or revived by a codicil executed after the 28th of August, 1860, the date of the act (*h*).

Consent to change of investments.

The consent of the persons for the time being entitled to the income of the property is generally required, in settlements, to any change of investment which the trustees may be authorized to make; and this consent is sometimes required to be in writing, and occasionally to be testified by deed. Where consent is required, it must be given previously to or at the time of the change of investment (*i*); for, as the consent is required as a check upon the trustees, a subsequent consent, when the mischief may be done, is evidently unavailing. The person whose consent is required is not, however, the sole judge of the propriety of any change of investment: the trustee, by virtue of his office, has also a discretion; and if he should consider the investment ineligible, he may refuse to make it, although requested so to do by the person whose consent ought to be obtained (*k*). But the terms of the instrument may require the trustees to change the investments at the request of any given person; and in this case they will generally be bound to act accordingly, unless the circumstances of the case should be such as were evidently not contemplated when the settlement was made (*l*).

Investment of settled money in the purchase of lands.

In settlements of personal property authority is sometimes given to the trustees to make investments in the purchase of landed estates. As land devolves in a different manner from personal property, it is obvious that

(*h*) Stat. 23 & 24 Vict. c. 145, s. 34.

(*i*) *Bateman* v. *Davis*, 3 Madd. 98; *Greenham* v. *Gibbeson*, 10 Bing. 363; *Wiles* v. *Gresham*, 2 Drewry, 258.

(*k*) *Lee* v. *Young*, 2 You. & Coll. N. C. 532.

(*l*) *Boss* v. *Godsall*, 1 You. & Coll. N. C. 617; *Cadogan* v. *Earl of Essex*, 2 Drewry, 227.

a simple change of the property from personalty to land would in many cases materially disarrange the destination of the property. Thus if a person entitled under the settlement to a reversionary interest in the settled fund should have died intestate, his administrator would be entitled to such interest, so long as the property continued to be personal, but, on its being changed into real estate, it would shift to his heir-at-law. In order to obviate this inconvenience, it is so contrived that the lands to be purchased should, from the moment the purchase is made, be considered as personal property. To effect this object, the lands when purchased are directed to be held by the trustees upon trust to sell them, with the consent of the equitable tenants for life, during their lives, and after their decease at the discretion of the trustees (*m*). This trust for sale converts the lands into money in the contemplation of equity; for it is a rule of equity, that whatever is agreed to be done shall be considered as done already. In the words of Sir Thomas Sewell (*n*), "Nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land." And if land is clearly directed to be sold, the circumstance that the consent of some person or persons is required

(*m*) See Appendix B.

(*n*) In *Fletcher* v. *Ashburner*, 1 Bro. C. C. 499, approved by Lord Alvanley in *Wheldale* v. *Partridge*, 5 Ves. 396, 397. See also *Griffith* v. *Ricketts*, 7 Hare, 299.

to the sale will not prevent the immediate conversion of the land into money in the contemplation of equity, although such a circumstance may often cause a long postponement of the period of its actual conversion (*o*). Notwithstanding a trust for the sale of land, if all the parties interested should be of full age (*p*), and if females unmarried (*q*), they may elect that the land shall not be sold; and after such election the land will be considered as real estate in equity as well as at law (*r*). And the election of the parties need not be expressed in so many words, but may be inferred from any acts by which their intention is clearly shown (*s*).

Election that land should not be sold.

All properly drawn settlements of personal estate formerly contained a power for the trustees or trustee for the time being, acting in the execution of the trusts, to give receipts for any money payable to them or him under the trusts, which receipts it was declared should effectually discharge the persons paying the money from all responsibility as to its application. The necessity of this provision arose from a rule of equity, by which any person who paid money to another, whom he knew to be merely a trustee, was bound to see the money applied according to the trusts (*t*). If, however, the trusts were of such a kind as to require time and discretion to carry them into effect, the receipt of the trustees would, from the nature of the case, have been an effectual discharge, without an express clause for this purpose (*u*). But by a recent act of parliament

Receipt clause.

New enactment.

(*o*) See *Leehmere* v. *Earl of Carlisle*, 3 P. Wms. 218, 219.

(*p*) *Van* v. *Barnett*, 19 Ves. 102.

(*q*) *Oldham* v. *Hughes*, 2 Atk. 452.

(*r*) *Davies* v. *Ashford*, 15 Sim. 42.

(*s*) *Lingen* v. *Sowray*, 1 P. Wms. 172; *Cookson* v. *Reay*, 5 Beav. 22; 12 Cl. & Fin. 121.

(*t*) *Spalding* v. *Shalmer*, 1 Vern. 301; *Lloyd* v. *Baldwin*, 1 Ves. sen. 173.

(*u*) *Doran* v. *Wiltshire*, 3 Swanst. 699; *Balfour* v. *Welland*, 16 Ves. 151.

it is provided, that the bonâ fide payment to and receipt of any person to whom any *purchase or mortgage money* shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security (*x*). It is the better opinion that this enactment is not retrospective; for it can scarcely be supposed that the legislature contemplated the existence of a prescience of this act in the authors of old settlements, inducing them to insert therein an express declaration that the act should not apply (*y*). And with respect to instruments executed and wills or codicils confirmed or revived by codicil executed after the 28th August, 1860, it is now provided that the receipts in writing of any trustees or trustee for any money payable to them or him, by reason or in the exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the person paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof (*z*).

Not retrospective.

Further enactment.

Power to appoint new trustees.

Every settlement, the trusts of which were likely to be of long duration, formerly contained a power of appointing new trustees in the event of any trustee dying, going to reside beyond the seas, desiring to be discharged, refusing, or becoming incapable to act in the execution of the trusts (*a*). And as the mere appointment of a trustee was not sufficient to vest the trust property in him, it was usual and proper to direct that, on every such appointment, the trust property should

(*x*) Stat. 22 & 23 Vict. c. 35, s. 23.

(*y*) See, however, *Bennett* v. *Lytton*, 2 John. & Hem. 155, 158.

(*z*) Stat. 23 & 24 Vict. c. 145, s. 29.

(*a*) See Appendix B.

be so conveyed, assigned, transferred or paid as effectually to vest the same in the new trustee jointly with the surviving or continuing trustees, or solely, as the case might require. Every new trustee was also invested with the same powers as the original trustees. But the act to which we have already referred (*b*), now provides that whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, shall die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or desiring to be discharged, or refusing, or becoming unfit or incapable to act as aforesaid; and so often as any new trustee or trustees shall be so appointed as aforesaid, all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustee, shall, with all convenient speed, be conveyed, assigned and transferred so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee as the case may require; and every new trustee or trustees to be appointed as

New enactment.

(*b*) Stat. 23 & 24 Vict. c. 145, s. 27, *ante*, pp. 293, 298, 299. This act applies also to trustees appointed by the Court of Chancery of the County Palatine of Lancaster. Stat. 28 Vict. c. 40.

aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of Chancery, either before or after the passing of the act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the deed, will, or other instrument creating the trust. This act, as we have before observed, extends only to instruments executed or wills confirmed or revived by codicil executed after the 28th of August, 1860. A mere power to appoint a new trustee does not render such appointment imperative; and in case of the death of any trustee, the survivors or survivor may still carry on the ordinary business of the trust (*c*). When a trustee has once accepted the office, he has no right to retire, unless the person having the power to appoint another trustee in the event of his retiring should consent to do so (*d*); or unless, from unforeseen circumstances, the duties of the trust should have become more onerous than was contemplated by the trustee when he accepted the office (*e*). A conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings (*f*).

Stamp duty.

Trustee Act, 1850.

The Trustee Act, 1850 (*g*), the provisions of which have been extended by a more recent act (*h*), empowers the Court of Chancery to appoint a new trustee in all cases where it is inexpedient, difficult or impracticable so to do without the assistance of that court, and either in substitution for, or in addition to, any existing

(*c*) *Warburton* v. *Sandys*, 14 Sim. 622.

(*d*) *Adams* v. *Paynter*, 1 Coll. 532.

(*e*) *Coventry* v. *Coventry*, 1 Keen, 758.

(*f*) Stat. 33 & 34 Vict. c. 97, s. 78.

(*g*) Stat. 13 & 14 Vict. c. 60. See Principles of the Law of Real Property, p. 142, 3rd and 4th eds.; 148, 5th ed.; 155, 6th ed.; 158, 7th ed.; 166, 8th ed.; 167, 9th ed.; 168, 10th ed.

(*h*) Stat. 15 & 16 Vict. c. 55.

trustee (*i*), and whether there be any existing trustee or not (*k*). Provision is also made for the appointment of a new trustee in lieu of any trustee who may have been convicted of felony (*l*), and for the infancy (*m*), lunacy or idiotcy of any trustee or executor (*n*), and for his being out of the jurisdiction of the court, or not being found, and for its being uncertain whether he is living or dead (*o*), and for his neglecting or refusing to transfer any stock, or to receive the dividends or income thereof, or to sue for or recover any chose in action (*p*). In the event of the bankruptcy of any trustee, the Court of Chancery is empowered to appoint a new trustee in his place (*q*).

Bankruptcy of trustee.

Trustees' costs and responsibilities.

The office of trustee of a settlement is one involving great responsibility, and frequently much trouble, without any remuneration; for a trustee is not allowed to make a profit of his trust. And if he be a solicitor, he cannot receive payment for his professional trouble incurred in the business of the trust (*r*), unless he expressly stipulate before accepting the office, that he shall be permitted to do so (*s*), or unless his charges be voluntarily paid by the cestui que trust with full knowledge that they might have been resisted (*t*). But

Solicitor cannot charge for professional trouble.

(*i*) Stat. 13 & 14 Vict. c. 60, ss. 32, 35.

(*k*) Stat. 15 & 16 Vict. c. 55, s. 9.

(*l*) Sect. 8.

(*m*) Sect. 3.

(*n*) Stat. 13 & 14 Vict. c. 60, ss. 5, 6; 15 & 16 Vict. c. 55, ss. 10, 11.

(*o*) Stat. 13 & 14 Vict. c. 60, ss. 22, 25.

(*p*) Stat. 13 & 14 Vict. c. 60, ss. 23, 24, 25; stat. 15 & 16 Vict. c. 55, ss. 4, 5.

(*q*) Stat. 32 & 33 Vict. c. 71, s. 117; *Coombes* v. *Brookes*, V.-C. W., Law Rep., 12 Eq. 61.

(*r*) *Moore* v. *Frowd*, 3 My. & Craig, 45; *Fraser* v. *Palmer*, 4 You. & Coll. 515; *Collins* v. *Carey*, 2 Beav. 128; *Bainbrigge* v. *Blair*, 8 Beav. 588; *Todd* v. *Wilson*, 9 Beav. 486. See *Ex parte Newton*, 3 De Gex & Sm. 584.

(*s*) *Re Sherwood*, 3 Beav. 388.

(*t*) *Stanes* v. *Parker*, 9 Beav. 385. See *Gomley* v. *Wood*, 3 Jones & Lat. 678.

a trustee may charge against the trust property all costs and expenses properly incurred in the conduct of the trust. And, it has been held, that in the event of a suit being brought against the trustees, one of the trustees, being a solicitor, may be employed by his co-trustees, and may make the usual charges against them, provided the amount of the costs be not thereby increased (*u*). And every trustee is allowed in a suit his full costs, as between solicitor and client (*x*). But his right to costs may be forfeited by his negligence or misconduct (*y*); or he may even be made to pay the costs of the other parties (*z*). As the trustee has the legal title to the property, he is often enabled, if fraudulently inclined, to sell it or spend it for his own benefit. It is therefore highly proper that his conduct should be narrowly scrutinized, and that he should be invariably punished for any breach of faith. But the Court of Chancery goes further than this, and punishes, with almost equal severity, his neglect of duties, which in many cases he scarcely knows that he has undertaken. Thus, if a trustee, by his negligence or misplaced confidence in his co-trustee, gives him an opportunity to commit a breach of trust, of which opportunity the co-trustee avails himself, the innocent trustee will be made to replace the whole of the fund abstracted by the other (*a*). So if the trustee should depart from the letter of his trust, as by

(*u*) *Cradock* v. *Piper*, 1 Mac. & Gord. 664; *Clack* v. *Carlon*, V.-C. W., 7 Jur., N. S. 441. See, however, *Lincoln* v. *Windsor*, 9 Hare, 158; *Lyon* v. *Baker*, 5 De Gex & Sm. 622; *Broughton* v. *Broughton*, L. C., 1 Jur., N. S. 965; 5 De Gex, M. & G. 160.

(*x*) 2 Fonb. Eq. 176.

(*y*) *Campbell* v. *Campbell*, 2 My. & Craig, 25; *Howard* v. *Rhodes*, 1 Keen, 581.

(*z*) *Wilson* v. *Wilson*, 2 Keen, 249; *Willis* v. *Hiscox*, 4 My. & Craig, 197; *Firmin* v. *Pulham*, 2 De Gex & Sm. 99.

(*a*) *Lord Shipbrook* v. *Lord Hinchinbrook*, 11 Ves. 252; *Brice* v. *Stokes*, 11 Ves. 319; *Hanbury* v. *Kirkland*, 3 Sim. 265; *Booth* v. *Booth*, 1 Beav. 125; *Broadhurst* v. *Balguy*, 1 You. & Coll. N. C. 16; *Styles* v. *Guy*, 1 Mac. & Gord. 422; *Dix* v. *Burford*, 19 Beav. 409.

investing the trust fund on an unauthorized security, although at the importunity of some of the parties interested, and with a bonâ fide desire to benefit them all, he will be answerable for any loss which such departure may have occasioned (*b*). And if, being ignorant of law, he should give himself up entirely to his professional adviser, he may still suffer from the mistake of his solicitor or conveyancer (*c*); and in such a case he will scarcely perhaps see the justice of the remark that he might (had he known how) have chosen a wiser solicitor, or a more learned counsel (*d*). In all ordinary settlements, clauses used to be inserted for the indemnity and reimbursement of trustees, to the effect that they should not be answerable the one for the other of them, or for signing receipts for the sake of conformity, or for involuntary loss; and that they might reimburse themselves out of the trust funds all costs and expenses incurred in relation to the trust. But these clauses, though often very highly valued by trustees, really afforded them little, if any, further protection than they would have been entitled to, if left to the ordinary rules of equity (*e*). It has, however, been recently enacted that every deed, will or other instrument creating a trust, either expressly or by implication, shall be deemed to contain these clauses (*f*). It would have been more direct, and therefore more philosophical, to alter the rules of equity with respect to trustees, if alteration were required, rather than to enact that a deed shall

New enactment.

(*b*) *Driver* v. *Scott*, 4 Russ. 195; *Pride* v. *Fooks*, 2 Beav. 430; *Forrest* v. *Elwes*, 4 Ves. 497; *Watts* v. *Girdlestone*, 6 Beav. 188.

(*c*) *Willis* v. *Hiscox*, 4 My. & Craig, 197; *Angier* v. *Stannard*, 3 My. & Keen, 566; *Hampshire* v. *Bradley*, 2 Coll. 34; *Boulton* v. *Beard*, 3 De Gex, M. & G. 608. See, however, *Poole* v. *Pass*, 1 Beav. 600; *Holford* v. *Phipps*, 3 Beav. 434; 4 Beav. 475.

(*d*) 3 My. & Keen, 572.

(*e*) *Fenwick* v. *Greenwell*, 10 Beav. 412; *Brumridge* v. *Brumridge*, 27 Beav. 5.

(*f*) Stat. 22 & 23 Vict. c. 35, s. 31.

be deemed to contain clauses which in fact are not there.

Act for better securing trust funds and the relief of trustees.

In order to provide means for securing trust funds, and for relieving trustees from the responsibility of administering them, an act of parliament has been passed (*g*), whereby all trustees, executors, administrators or other persons having in their hands (*h*) any monies belonging to any trust whatsoever, or the major part of them (*i*), may pay the same, with the privity, formerly of the accountant-general of the Court of Chancery, and now of the paymaster-general (*j*), into the Bank of England, to the account of such accountant-general or paymaster-general in the matter of the trust, in trust to attend the orders of the court. Bank annuities, East India and South Sea stock, and government and parliamentary securities, held upon trust, may also be transferred or deposited in like manner. The trust is then administered by the court upon petition in a summary way, without a bill, unless the court direct any suit to be instituted (*k*). Where the fund does not exceed in amount or value the sum of five hundred pounds, jurisdiction is now given to the county courts; the fund, if money, being paid into a post-office savings bank established in the town in which the county court is held, in the name of the registrar of the court, in trust to attend the orders of the court. And stocks or securities may be transferred into or deposited in the names of the treasurer and registrars of the court upon the like trust (*l*). Where there is not a treasurer, a person shall be nominated, by rule of practice, to whom

County courts.

(*g*) Stat. 10 & 11 Vict. c. 96, s. 1.

(*h*) *Buckley's Trust*, 17 Beav. 110.

(*i*) See stat. 12 & 13 Vict. c. 74.

(*j*) Stat. 35 & 36 Vict. c. 44; *ante*, p. 216, n. (*p*).

(*k*) Stat. 10 & 11 Vict. c. 96, s. 2.

(*l*) Stat. 30 & 31 Vict. c. 142, ss. 24, 25.

the transfer or deposit, in conjunction with the registrar, may be made (*m*).

Punishment of fraudulent trustees.

Salutary enactments have recently been made for the punishment of fraudulent trustees, directors, public officers and managers of corporations and public companies (*n*). Other acts empower any trustee, executor or administrator, by petition or statement to be signed by counsel, to apply to any judge of the Court of Chancery, for his opinion, advice or direction on any question respecting the management or administration of the trust property (*o*).

Power to apply for the opinion of a judge.

Covenants for settlement of wife's future property.

In some marriage settlements, in addition to the settlement actually made, a covenant is inserted for the settlement of all such property as the intended wife shall become entitled to during the coverture or marriage. It sometimes happens that at the time when such covenant is entered into, the wife is, without being aware of it, entitled to other property, besides that actually settled. In such a case, the general rule is that the property, to which she is then entitled, is subject to the covenant, and ought to be settled, as well as that which she may subsequently acquire (*p*). But as the question is entirely one of intention, if the property to which the wife is entitled appear to have been purposely omitted, it will not be bound by such a covenant (*q*). If the covenant to settle the wife's future property be entered into by

(*m*) Stat. 30 & 31 Vict. c. 142, s. 24.

(*n*) Stat. 24 & 25 Vict. c. 96, ss. 80—86. The stat. 20 & 21 Vict. c. 54, was repealed by stat. 24 & 25 Vict. c. 95.

(*o*) Stat. 22 & 23 Vict. c. 35, s. 30; 23 & 24 Vict. c. 38, s. 9.

(*p*) *Grafftey* v. *Humpage*, 1 Beav. 46; *James* v. *Durant*, 2 Beav. 177; *Blythe* v. *Granville*, 13 Sim. 190; *Ex parte Blake*, 16 Beav. 463; *Re Mackenzie's Settlement*, L. R., 2 Ch. Ap. 345.

(*q*) *Hoare* v. *Hornby*, 2 You. & Coll. N. C. 121; *Otter* v. *Melvill*, 2 De Gex & Smale, 257; *Wilton* v. *Colvin*, 3 Drew. 617; *Archer* v. *Kelly*, 1 Drew. & S. 300.

Covenants to settle husband's property.

the intended husband alone, the wife will not be bound to settle any future property to which she may become entitled for her separate use (*r*). Occasionally covenants are unadvisedly entered into by the intended husband to settle on his children, or to leave to them by his will, all the property that he may acquire during the coverture, or all his property generally (*s*). So a father may covenant, on the marriage of his daughter, to leave her as great a share in his property as to any of his other children (*t*). These covenants will be enforced in equity; but from their vague and uncertain character, they are likely to lead to much litigation. A covenant to settle property of a given value, when no time is limited for its performance, creates no lien on any of the property of the covenantor (*u*). And it appears to be now settled, contrary to what was before supposed to be the law, that no lien is created whether a time for the performance of the covenant be specified or not (*x*).

Marriage settlement equally valid as a purchase.

Marriage, as we have seen (*y*), is a valuable consideration. Every settlement, therefore, made by parties of full age, previously to and in consideration of marriage, or made subsequently to marriage in pursuance of

(*r*) *Douglas* v. *Congreve*, 1 Keen, 410, 423; *Travers* v. *Travers*, 2 Beav. 179; *Drury* v. *Scott*, 4 You. & Coll. 264; *Ramsden* v. *Smith*, 2 Drew. 298; *Hammond* v. *Hammond*, 19 Beav. 29. See also *Butcher* v. *Butcher*, 14 Beav. 222; *Cramer* v. *Moore*, 3 Sma. & Giff. 141; *Grey* v. *Stuart*, 2 Giff. 398; *Brooks* v. *Keith*, 1 Drew. & S. 462; *Coventry* v. *Coventry*, 32 Beav. 612; *Re Mainwaring's Settlement*, L. R., 2 Eq. 487.

(*s*) *Lewis* v. *Madocks*, 17 Ves. 48; *Needham* v. *Smith*, 4 Russ. 318; *Needham* v. *Kirkman*, 4 Barn. & Ald. 531; *Hardey* v. *Green*, 12 Beav. 182.

(*t*) *Willis* v. *Black*, 4 Russ. 170; *Clegg* v. *Clegg*, 2 Russ. & My. 570; *Eardley* v. *Owen*, 10 Beav. 572; *Jones* v. *How*, 7 Hare, 267; 9 C. B. 1. See *Phelp* v. *Ameotts*, V.-C. J., 17 W. R. 703.

(*u*) *Freemoult* v. *Dedire*, 1 P. Wms. 429; *Berrington* v. *Evans*, 3 You. & Coll. 384.

(*x*) *Mornington* v. *Keane*, 2 De Gex & Jones, 292, explaining *Roundell* v. *Brearey*, 2 Vern. 482, and questioning *Wellesley* v. *Wellesley*, 4 My. & Cr. 561, 581.

(*y*) *Ante*, p. 79.

written articles (*z*), stands on the footing of a purchase, and has equal validity. But a voluntary settlement is liable to be defeated by the creditors of the settlor, if he was so much indebted at the time as to bring the settlement within the provisions of the statute of the 13th of Elizabeth (*a*) already noticed (*b*), by which the alienation of goods and chattels made for the purpose of delaying, hindering or defrauding creditors, is rendered void as against them. For although by the phrase "goods and chattels" was intended only such personal property as could be taken by the sheriff under an execution on a judgment (*c*), yet as almost all kinds of personal property may now be taken in execution (*d*), or charged with the payment of judgment debts (*e*), all such property is now within the compass of the statute (*f*). The voluntary assignment of goods or chattels, or delivery or making over of bills, bonds, notes or other securities, or the voluntary transfer of any debts made by a person being at the time insolvent (*g*), was by the former bankruptcy acts void in the event of his bankruptcy (*h*). This provision embraced all personal estate capable of assignment or transfer (*i*); but it did not extend to a gift of money (*j*). The provisions of the Bankruptcy Act, 1869, on this subject

Voluntary settlement void as against creditors.

(*z*) Stat. 29 Car. II. c. 3, s. 4. See *ante*, p. 83.

(*a*) Stat. 13 Eliz. c. 5; *Skarf* v. *Soulby*, 1 Mac. & Gord. 364; *Mackay* v. *Douglas*, V.-C. M., Law Rep., 14 Eq. 106.

(*b*) *Ante*, p. 50.

(*c*) *Sims* v. *Thomas*, 2 Adol. & Ell. 536. See *ante*, p. 53.

(*d*) Stat. 1 & 2 Vict. c. 110, s. 12. See *ante*, p. 125.

(*e*) Stats. 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1; *ante*, p. 125.

(*f*) See *Edwards* v. *Cooper*, 11 Q. B. 33; *Barrack* v. *M'Culloch*, 3 Kay & John. 110; *Jenkyn* v. *Vaughan*, 3 Drew. 419.

(*g*) See *Cutten* v. *Sanger*, 2 You. & Jerv. 459.

(*h*) Stat. 12 & 13 Vict. c. 106, s. 126, repealing stat. 6 Geo. IV. c. 16, s. 73, to the same effect.

(*i*) *Brown* v. *Bellaris*, 5 Mad. 53.

(*j*) *Ex parte Shortland*, 7 Ves. 88; *Kensington* v. *Chandler*, 2 Man. & Selw. 36; *Ex parte Skerratt*, 2 Rose, 384.

are very stringent, and have been already mentioned. And the word "property," which is employed by the act, is expressly defined by it to include money as well as every other description of property (*k*).

Voluntary settlement binding on the settlor.

Although a voluntary settlement may thus be defeated by creditors, yet, when once completed, it is binding on the settlor, who cannot by any means undo it (*l*). Thus, in one case (*m*), a maiden lady not immediately contemplating marriage, but thinking such an event possible, transferred a sum of stock into the names of trustees in trust for herself until she should marry, and, after her marriage, in trust for her separate use for her life, free from the control of any person or persons with whom she might intermarry, and, after her decease, upon trusts for the benefit of any such husband, and her child or children by any husband or husbands. She afterwards, being still unmarried, filed a bill in Chancery, praying that the settlement might be delivered up to her to be cancelled, and that the stock might be ordered to be re-transferred by the trustees. But the court held that she was bound by the settlement she had made, and was not entitled to any assistance to release her from it. It is however the duty of every solicitor who prepares a voluntary settlement to suggest the insertion of a power of revocation. And in some cases the Court of Chancery has set aside voluntary settlements irrevocably made, in ignorance that such a power might have been inserted (*n*).

Power of revocation.

(*k*) *Ante*, pp. 161, 162. Stat. 32 & 33 Vict. c. 71, s. 4.

(*l*) *Ellison* v. *Ellison*, 6 Ves. 656; *Edwards* v. *Jones*, 1 My. & Craig, 226; *Newton* v. *Askew*, 11 Beav. 145; *Kekewich* v. *Manning*, 1 De Gex, Mac. & Gord. 176; *Bentley* v. *Mackay*, 15 Beav. 12; *Bridge* v. *Bridge*, 16 Beav. 315; *Re Way's Settlement*, Lds. Jus., 13 W. R. 149; 2 De Gex, Jones & Smith, 365.

(*m*) *Bill* v. *Cureton*, 2 My. & Keen, 503. See also *Petre* v. *Espinasse*, 2 My. & Keen, 496; *M'Donnell* v. *Hesilrige*, 16 Beav. 346; *Donaldson* v. *Donaldson*, Kay, 711.

(*n*) See *Hall* v. *Hall*, V.-C. W., Law Rep., 14 Eq. 365; *Phillips*

Settlement for settlor's own benefit revocable by him.

If the object of the settlor is merely his own benefit or convenience, the settlement will be revocable by him at his pleasure. Thus where a man, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, his object is said to be, not to benefit his creditors, but to benefit himself by the payment of his debts (*o*). He may accordingly revoke the trust thus created (*p*), so long as the creditors remain in ignorance of it (*q*). This rule, however, though well established, seems to attribute to debtors a somewhat light estimation of the claims of their creditors; and there appears to be no disposition in the courts to extend it (*r*).

Voluntary settlements of personal estate not void against subsequent purchasers.

The statute of Elizabeth (*s*), by which voluntary settlements of lands and other hereditaments are void as against subsequent purchasers for valuable consideration, though it extends to chattels real (*t*), does not apply to purely personal estate (*u*). A voluntary settlement of personal estate cannot therefore be defeated by a subsequent sale of the property by the settlor.

v. *Mullings*, Law Rep., 7 Ch. Ap. 244, 247.

(*o*) *Per* Sir C. Pepys, M. R., 2 My. & Keen, 511; cited by Wigram, V.-C, in *Hughes* v. *Stubbs*, 1 Hare, 479.

(*p*) *Garrard* v. *Lord Lauderdale*, 3 Sim. 1; *Acton* v. *Woodgate*, 2 My. & Keen, 492; *Ravenshaw* v. *Hollier*, 7 Sim. 3; *Law* v. *Bagwell*, 4 Dru. & Warren, 398; *Smith* v. *Keating*, 6 C. B. 136; *Driver* v. *Mawdesley*, 16 Sim. 511.

(*q*) *Browne* v. *Cavendish*, 1 Jones & Lat. 606, 635; *Griffith* v. *Ricketts*, 7 Hare, 299, 307; *Mackinnon* v. *Stewart*, 1 Sim. N. C. 76, 89, 90; *Harland* v. *Binks*, 15 Q. B. 713; *Smith* v. *Hurst*, 10 Hare, 30. But see *Cornthwaite* v. *Frith*, 4 De Gex & Smale 552.

(*r*) See *Wilding* v. *Richards*, 1 Coll. 661; *Simmonds* v. *Palles*, 2 Jones & Lat. 489; *Kirwan* v. *Daniel*, 5 Hare, 493, 499—501.

(*s*) Stat. 27 Eliz. c. 4; Principles of the Law of Real Property, 56, 1st ed.; 59, 2nd ed.; 62, 3rd and 4th eds.; 67, 5th ed.; 71, 6th ed.; 73, 7th ed.; 74, 8th ed.; 76, 9th and 10th eds.

(*t*) Co. Litt. 3 b; 6 Rep. 72.

(*u*) 2 My. & Keen, 512.

Stamps on settlements.

Settlements of any definite and certain principal sum of money, of any currency, whether British, foreign or colonial, or of any definite and certain share in the funds, or India promissory notes, or in the stocks or funds of any foreign or colonial state or government, or in the capital stock or funded debt of any company, corporation or society in the United Kingdom, or of any foreign or colonial company, corporation or society, are now liable to an ad valorem duty of one-fourth per cent., or five shillings per hundred pounds, on the amount of the money or the value of the stock or share settled, according to the schedule contained in the Stamp Act, 1870 (*x*). The duty on the settlement of money secured by a policy of assurance is now charged on the sum secured (*y*); but if there be no provision made for keeping up such policy, then the ad valorem duty is chargeable only on the value of the policy at the date of the settlement (*z*). And if the instrument contains a statement of such value, and is stamped in accordance with such statement, it is, so far as regards such policy, to be deemed duly stamped, unless or until it is shown that such statement is untrue, and that the instrument is in fact insufficiently stamped (*a*).

Policy of assurance.

The Succession Duty Act, 1853.

By the Succession Duty Act, 1853 (*b*), provision has been made for charging certain duties on the succession to property upon the death of any person dying after the 19th of May, 1853. These duties are at the same rates as the legacy duty, of which an account will be given in the chapter on wills, increasing in proportion to the distance in consanguinity between the predecessor, from whom the interest succeeded to is derived, and the successor.

(*x*) Stat. 33 & 34 Vict. c. 97, ss. 2, pars. (8), (9), 3.
(*y*) Sect. 124.
(*z*) Sect. 124, par. (1).
(*a*) Sect. 124, par. (2).
(*b*) Stat. 16 & 17 Vict. c. 51.

CHAPTER II.

OF JOINT OWNERSHIP AND JOINT LIABILITY.

Joint owners.

THERE may be a joint ownership of any kind of personal property, in the same manner as there may be a joint tenancy of real estate (*a*); and the four unities of *possession, interest, title* and *time*, which characterize a joint tenancy of real estate, apply also to a joint ownership of chattels. But as no estates can exist in personal property, the distinctions which hold with respect to joint estates for life, in tail, or in fee, do not occur in a joint ownership of personalty. If personal property, whether in possession or in action, be given to A. and B. simply, they will be joint owners, having equal rights as between themselves, during the joint ownership, and being, with respect to all other persons than themselves, in the position of one single owner. Hence it follows, that if a bond or covenant be given or made to two or more jointly, they must all join in suing upon it (*b*); and a release by one of them to the obligor is sufficient to bar them all (*c*). As a further consequence of the unity of a joint ownership, the important right of survivorship, which distinguishes a joint tenancy of real estate, belongs also to a joint ownership of personal property. Whether the subject of the joint ownership be a chattel real as a lease, or a chose in possession as a horse, or a chose in action as a debt or legacy, the

Joint bond, all must sue.

Release by one bars all.

Survivorship.

(*a*) See Principles of the Law of Real Property, p. 99, 1st ed.; 104, 2nd ed.; 109, 3rd and 4th eds.; 114, 5th ed.; 120, 6th ed.; 123, 7th ed.; 128, 8th and 9th eds.; 129, 10th ed.

(*b*) *Slingsby's case*, 5 Rep. 18 b; *Petrie* v. *Bury*, 3 Barn. & Cress. 353; 1 Wms. Saund. 291 i.

(*c*) 2 Rol. Abr. 410 (D.), pl. 1, 5.

surviving joint owner will be entitled to the whole, unaffected by any disposition which the deceased joint owner may have made by his will, unless the joint tenancy should have been previously severed in the lifetime of both the parties (*d*). And for this reason trustees of settlements of personal estate are always made joint owners, in order that the surviving trustees may take the entire fund, rather than that the executors or administrators of any trustee who may happen to die should have any right to intermeddle with the share of the deceased. Where any *beneficial* interest accrues to any joint owner by survivorship, it is deemed a succession within the Succession Duty Act, 1853, and as such liable to the succession duty (*e*).

Trustees of personal estate made joint owners.

Succession Duty Act, 1853.

If the joint ownership be created by a will, it is not necessary that the shares of all the joint owners should vest at the same time. Thus under a bequest to A. for life, and after his decease to the issue (*f*) or children (*g*) of B., without words of severance, all the issue or children, born in A.'s lifetime, will become entitled jointly, though some may not be living when the shares of the others become vested interests. On the decease of any of them therefore before payment, the survivors will become entitled to their shares. A similar exception to the unity of *time* occurs also in the case of a devise of real estate by will (*h*).

The shares of joint owners under a will need not vest at the same time.

In analogy to the rule by which a joint estate in fee-

Limitation to

(*d*) Litt. sects. 281, 282; *Lady Shore* v. *Billingsley*, 1 Vern. 482; *Willing* v. *Baine*, 3 P. Wms. 115; *Morley* v. *Bird*, 3 Ves. 629; *Williams* v. *Henshaw*, 1 John & H. 546.

(*e*) Stat. 16 & 17 Vict. c. 51, s. 3; *ante*, p. 314.

(*f*) *Bridge* v. *Yates*, 12 Sim. 645.

(*g*) *Amies* v. *Skillern*, 14 Sim. 428.

(*h*) See Principles of the Law of Real Property, 102, 1st ed.; 107, 2nd ed.; 112, 3rd and 4th eds.; 117, 5th ed.; 123, 6th ed.; 126, 7th ed.; 131, 8th and 9th eds.; 132, 10th ed.

simple in lands is created by a limitation to two or more, *their heirs and assigns*, it is customary with conveyancers to make a gift of personal estate to two or more jointly, by limiting it to them, *their executors, administrators and assigns*. This, however, though usual, is not strictly necessary. In ill-framed instruments, limitations of personalty are sometimes made to two persons, "and the survivor of them, and the executors and administrators of such survivor." If, however, the persons are simply made joint owners, the law will be sufficient of itself to carry the property to the survivor. Bonds and covenants, when intended to be given or made to two or more jointly, are in like manner usually given or made to the obligees or covenantees, *their executors and administrators;* or if the subject-matter be assignable, to them, *their executors, administrators and assigns*. But when entered into with two or more persons, bonds or covenants cannot, as respects the obligees or covenantees, be joint or several, at their election, for one and the same cause; for otherwise the court would be in doubt for which of them to give judgment (*i*). And whether a covenant be joint or several depends much more upon the subject-matter than upon the words employed. If each of the covenantees has a separate interest, each may have a separate cause of action, and the covenant will accordingly in such a case be several, though expressed to be made with the covenantees jointly and severally (*j*). But if each of the covenantees has not a separate cause of action, all of them must concur in suing upon the covenant, even although it be expressed to be made with some of them, "and as a separate covenant" with the others (*k*); for if all may sue, all must (*l*).

joint owners, their executors, administrators and assigns.

Joint bonds and covenants.

Joint or several.

(*i*) 5 Rep. 19 a; 1 East, 501.

(*j*) 5 Rep. 19 a; 1 Wms. Saund. 155 a, n. (1).

(*k*) *Slingsby's case*, 5 Rep. 18 b; *Anderson* v. *Martindale*, 1 East, 497; *Raley* v. *Addenbrooke*, 4 Q. B. 197; *Hopkinson* v. *Lee*, 6 Q. B. 964; *Bradburne* v. *Botfield*, 14 Mee. & Wels. 559; *Wakefield* v. *Brown*, 9 Q. B. 209; *Keightley* v. *Watson*, 3 Exch. Rep. 716.

(*l*) 4 Q. B. 208; *Wetherell* v.

Partners in trade, no survivorship of choses in possession.

An exception to the right of survivorship between joint owners occurs in the case of partners in trade. In this case the law, in order to the encouragement of commerce, vests in the executors or administrators of a deceased partner, the share of the deceased in all personal chattels in possession, such as merchandize or ships, which were the joint property of the partnership (*m*). But this rule does not extend at law to *choses in action*, which must accordingly be sued for in the name of the survivor (*n*). In equity, however, the share of the deceased partner, both in the choses in possession and in action belonging to the partnership, devolves on his executors or administrators. The consequence is that, though the choses in action must be sued for by the surviving partner, he will be a trustee of the share of the deceased partner for his executors or administrators (*o*). The same rule is applied in equity even to real estate purchased for the purposes of a trading partnership (*p*), and conveyed to the partners as joint tenants in fee. On the decease of any of them, equity holds the survivors to be trustees of the share of the deceased for his executors or administrators as part of his personal estate (*q*).

Otherwise as to choses in action at law. But not in equity.

Real estate purchased for partnership purposes.

Joint owner-

Indeed, as a general rule, joint ownership is not

Langston, 1 Exch. Rep. 634; *Pugh* v. *Stringfield*, 3 C. B., N. S. 2.

(*m*) Co. Litt. 182 a; *Kempe* v. *Andrews*, 3 Lev. 290; *Rex* v. *Collector of Customs*, 2 Man. & Selw. 223; *Buckley* v. *Barber*, 6 Exch. Rep. 164.

(*n*) *Martin* v. *Crompe*, 1 Lord Raym. 340; S. C., 2 Salk. 444; 2 Wms. Saund. 117 b, n. (2).

(*o*) *Jefferey*s v. *Small*, 1 Vern. 217; *Lake* v. *Craddock*, 3 P. Wms. 158.

(*p*) *Randall* v. *Randall*, 7 Sim. 271.

(*q*) *Phillips* v. *Phillips*, 1 My. & Keen, 649, 663; *Broom* v. *Broom*, 3 My. & Keen, 443; *Morris* v. *Kearsley*, 2 Yon. & Coll. 139; *Bligh* v. *Brent*, 2 Yon. & Coll. 258; *Houghton* v. *Houghton*, 11 Sim. 491; *Custance* v. *Bradshaw*, 4 Hare, 315, 322; *Darby* v. *Darby*, 3 Drew. 495; see *Cookson* v. *Cookson*, 8 Sim. 529.

favoured in equity, on account of the right of survivorship which attaches to it (*r*). If therefore two persons advance money by way of mortgage or otherwise, and take the security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the representatives of the deceased, of the share advanced by him (*s*). And when the intention is that the survivor should receive the whole, a declaration should be inserted that his receipt alone shall be a sufficient discharge for the money secured (*t*).

Survivorship not favoured in equity.

No survivorship in equity of joint securities.

An ownership in common (or, as it is usually styled in analogy to real estate, a tenancy in common) of chattels may arise either from the severance of a joint ownership, or from a gift to two or more to hold in common (*u*). As, however, a chose in action is inalienable at law, a joint ownership of a chose in action cannot be severed at law by either, or even by both, of the joint owners. Thus in case of the bankruptcy of a joint creditor, by which all his estate becomes vested in his assignees, an action against the debtor must be brought in the joint names, formerly of the assignees, and now of the creditors' trustees and the other joint creditors (*v*). And if two joint creditors should become bankrupt, the action must be brought in the joint names, formerly of the assignees, and now of the creditors' trustees of both of them (*w*). A tenancy in common cannot in fact exist at law of a chose in action. A. may owe 20*l.* to B. and C. jointly, or he may owe 10*l.* to B. and 10*l.* to

Ownership in common.

No tenancy in common at law of a chose in action.

(*r*) 2 Atk. 55; 2 Ves. sen. 258.

(*s*) *Petty* v. *Styward*, 1 Chan. Rep. 57; 1 Eq. Ca. Ab. 290.

(*t*) See Principles of the Law of Real Property, 342, 1st ed.; 343, 2nd ed.; 355, 3rd ed.; 361, 4th ed.; 372, 5th ed.; 394, 6th ed.; 401, 7th ed.; 420, 8th ed.; 416, 9th ed.; 419, 10th ed.

(*u*) Litt. sect. 321.

(*v*) *Thomason* v. *Frere*, 10 East, 418. See stat. 32 & 33 Vict. c. 71, s. 105, and the repealed stat. 12 & 13 Vict. c. 106, s. 152, repealing stat. 5 & 6 Vict. c. 122, s. 31.

(*w*) See *Hancock* v. *Heywood*, 3 T. Rep. 433.

C.; but he cannot owe 20*l.* to B. and C. in common. If each has a several cause of action, each must sue separately. In equity, however, the case is different. Though B. and C. are joint owners at law, in equity they may be owners in common; and on the decease of either of them, his share may in equity belong to his representatives, instead of accruing beneficially to his companion. And with regard to letters-patent, it appears that, even at law, they may be the subject of an ownership in common, and that the assignee of an undivided share may alone sue for an infringement of that part of the patent, without joining the persons interested in the remaining shares (*x*). And one owner in common of letters-patent can work the patent on his own account, without the concurrence of the others (*y*). In deciding whether a tenancy in common has been created by deed, there is very seldom any difficulty. But in wills, where greater indulgence is given to informal words, the rule is, that any words which denote an intention to give to each of the legatees a distinct interest in the subject of gift, will be sufficient to make them tenants in common. Thus a gift by will to two or more persons "equally to be divided between them" (*z*), or simply "between them" (*a*), or "in joint and equal proportions" (*b*), or "equally" (*c*), or "respectively" (*d*), or "to be enjoyed alike" (*e*), will make such persons tenants in common, and not joint tenants, as they would have been without the insertion

Otherwise in equity.

Letters patent.

Gifts by will which make a tenancy in common.

(*x*) *Dunnicliff* v. *Mallet*, 7 C. B., N. S. 209; *Walton* v. *Lavater*, 8 C. B., N. S. 162.

(*y*) *Mathers* v. *Green*, L. C., 11 Jur., N. S. 845.

(*z*) *Blisset* v. *Cranwell*, 1 Salk. 226; *Phillips* v. *Phillips*, 2 Vern. 430; 1 Eq. Ca. Abr. 292, pl. 6; 1 P. Wms. 34.

(*a*) *Lashbrook* v. *Cock*, 2 Mer. 70.

(*b*) *Ettricke* v. *Ettricke*, 2 Ambl. 656.

(*c*) *Lewen* v. *Dodd*, Cro. Eliz. 443.

(*d*) 1 Atk. 580; 1 Ves. sen. 104.

(*e*) *Loveacres* d. *Mudge* v. *Blight*, Cowp. 352.

of such words. In this respect the rule is the same whether the subject of the devise or bequest be real or personal estate (*f*).

Owners in common of personal estate, like tenants in common of lands, having merely a unity of possession: the interest of one may be larger or smaller than that of the other, one having, for instance, one-third, and the other, two-thirds of the property. So the title need not be the same, as one may have been originally a joint tenant with a third person, who may have severed the joint tenancy by assigning his moiety to the other. The right of survivorship, which springs from a unity of interest and title, has accordingly no place between owners in common (*g*).

Owners in common have merely a unity of possession.

No survivorship.

Connected with the subject of joint ownership is that of joint liability. Two or more persons may be jointly liable to the same debt or demand. In a joint bond, the obligors, according to the usual form, bind themselves, their heirs, executors and administrators jointly; and in a joint covenant, they, in like manner, covenant for themselves, their heirs, executors and administrators jointly. In every case of joint liability, each is liable for the whole debt (*h*), yet they are all, like joint owners, considered as one person. They must accordingly all be sued together during their joint lives (*i*); and a release to one of them will discharge them all (*j*). It is, however, provided by the Bankruptcy Act, 1869, that the order of discharge of a bankrupt shall not release any person who at the date of the order of adjudication was a partner with the bankrupt, or was jointly bound, or

Joint liability.

Release of one discharges all.

Discharge by Bankruptcy Act.

(*f*) See 2 Jarm. Wils. 161 *et seq.* 1st ed.; 211, 2nd ed.; 231, 3rd ed.

(*g*) Litt. sect. 321.

(*h*) 1 Barn. & Ald. 35.

(*i*) 1 Wms. Saund. 291 b, n. (4).

(*j*) 2 Rol. Abr. 412 (G), pl. 4; *Clayton* v. *Kynaston*, 2 Salk. 574; 2 Wms. Saund. 47 gg, n. (1); *Warwick* v. *Richardson*, 14 Sim. 281.

Discharge by Statute of Limitations.

had made any joint contract with him (*k*). And if any person jointly liable upon any simple contract shall be discharged by the Statute of Limitations, but his co-contractor or co-contractors shall be liable by virtue of a new acknowledgment or promise, judgment may be given and costs allowed against the latter person or persons only (*l*). And if such person or persons shall plead in abatement that the other ought to be jointly sued, and it shall appear that he was discharged by the statute, the issue joined on such plea shall be found against such person or persons pleading the same (*m*).

Absence beyond seas.

The fact of one joint debtor being beyond the seas at the time when the cause of action accrues, will not deprive the others of the benefit of the Statutes of Limitation; and the recovery of judgment against any who were not beyond seas, will be no bar to an action against the absent debtors on their return. And for this purpose no part of the United Kingdom, nor the Isle of Man, nor the Channel Islands, are to be considered as beyond seas (*n*).

After the decease of one joint debtor the survivor solely liable.

After the decease of any one joint debtor the survivors or survivor of them may still be sued for the whole debt, as though the deceased had no share in it (*o*), and the estate of the deceased will be discharged from all liability both at law and in equity (*p*). So if a judgment be obtained against two or more jointly, and one of them die, the estate of the survivor or survivors, whether real or personal, will be exclusively liable to be taken in execution; although

(*k*) Stat. 31 & 32 Vict. c. 71, s. 50; *ante*, p. 166. The former enactment was stat. 24 & 25 Vict. c. 134, s. 163, repealing stat. 12 & 13 Vict. c. 106, s. 200, repealing stats. 6 Geo. IV. c. 16, s. 121, and 5 & 6 Vict. c. 122, s. 37, to the same effect.

(*l*) Stat. 9 Geo. IV. c. 14, s. 1.

(*m*) Sect. 2.

(*n*) Stat. 19 & 20 Vict. c. 97, ss. 11, 12.

(*o*) *Richards* v. *Heather*, 1 Barn. & Ald. 29.

(*p*) *Richardson* v. *Horton*, 6 Beav. 185; *Wilmer* v. *Currey*, 2 De Gex & Smale, 347; *Crossley* v. *Dobson*, 2 De Gex & Smale, 486; *Other* v. *Iveson*, 3 Drew. 177.

the real estate of the deceased, having formerly been bound from the date of the judgment, was until recently liable to contribute equally with the real estate of the survivors (*q*).

Joint and several liability.

A liability, however, may be both joint and several at the same time; and, as such a liability is more beneficial to the creditor, it is more usual than a liability which is simply joint. A joint and several bond by two persons runs in this form :—"for which payment to be well and truly made, we bind ourselves, and each of us, and the heirs, executors and administrators of us and of each of us, jointly and severally;" or if there be a larger number of obligors, say five, the better form is :—"for which payment to be well and truly made, we bind ourselves, and each of us, and any two, three, or four of us, and the heirs, executors and administrators of us, and of each of us, and of any two, three, or four of us, jointly and severally." But now, as we have seen (*r*), all mention of heirs, executors and administrators may be omitted. In the case of a joint and several bond thus worded, an action may be brought against all the obligors, or against any one, two, three or four of them whom the obligee may select; otherwise he must have sued either all of them jointly, or any one of them singly (*s*). A joint and several covenant is usually in this form :—"And the said A. B. and C. D. do hereby, for themselves, their heirs, executors and administrators jointly, and each of them doth hereby for himself respectively, and for his respective heirs, executors and administrators, covenant," &c.; or if there be more than two covenantors, the better form is, for

Form of a joint and several bond.

Form of a joint and several covenant.

(*q*) 3 Rep. 14 b; *Smarte* v. *Edsun*, 1 Lev. 30; 2 Wms. Saund. 51. See now stat. 27 & 28 Vict. c. 112; Principles of the Law of Real Property, p. 82, 7th ed.; 83, 8th ed.; 85, 9th ed.; 86, 10th ed.

(*r*) *Ante*, pp. 113, 114.

(*s*) *Per* Buller, J., in *Streatfield* v. *Halliday*, 3 T. Rep. 782.

the reason above given, "And the said A. B., C. D., E. F. and G. H., do hereby, for themselves, their heirs, executors and administrators jointly, and any two or three of them, do hereby, for themselves, their heirs, executors and administrators jointly, and each of them doth hereby for himself respectively, and for his respective heirs, executors and administrators, covenant," &c. In all cases of joint and several liability, each party is individually liable, and may be sued alone for the whole debt, or if the creditor please, he may sue them all jointly. In consequence of the joint liability, a release of one of the debtors will discharge them all; and, as they are all discharged, the creditor will thenceforth be unable even to sue any of them severally (*t*). As, however, the several liability is distinct from the joint, it is competent to the creditor, in releasing one of the debtors, expressly to reserve his remedy against the others; and in this case, each of the remaining debtors will continue severally liable (*u*). So he may covenant with one of the debtors never to sue him; and in such a case he will retain his remedy against the others severally (*v*). On account of the several liability, the estate of a person who has become jointly and severally bound is not discharged by his decease in the lifetime of his co-debtors, but still remains liable to the entire debt as respects the creditor, and to a proportion of it as respects the surviving co-debtors. It has been recently enacted, that no co-contractor or co-debtor, whether liable jointly only or jointly and severally, shall lose the benefit of the Statutes of Limitation

Release of one.

Covenant not to sue one.

Payment by co-debtor.

(*t*) 2 Rol. Abr. 412 (G), pl. 5; *Clayton* v. *Kynaston*, 2 Salk. 574; *Nicholson* v. *Revill*, 4 Adol. & Ell. 683; S. C., Nev. & Man. 192; *Evans* v. *Bremridge*, 2 Kay & John. 174; affirmed, 8 De Gex, M. & G. 100.

(*u*) *Ex parte Gifford*, 6 Ves. 807; *Thompson* v. *Lack*, 3 C. B. 540; *Kearsley* v. *Cole*, 16 Mee. & Wels. 136; *Price* v. *Barker*, Q. B., 1 Jur., N. S. 775; 4 E. & B. 760; *Willis* v. *De Castro*, 4 C. B., N. S. 216.

(*v*) *Lacy* v. *Kynaston*, 2 Salk. 575; 2 Wms. Saund. 48, n. (1).

by reason only of payment of any principal, interest or other money by any other co-contractor or co-debtor (*w*).

Liability of partners. Joint at law.

One of the most usual means of incurring a joint and several liability is the entering into a partnership. At law the liability of partners is joint only, as to debts incurred by the partnership; so that they ought all to be joined as defendants to an action at law for recovering any such debt (*x*). But a dormant partner, whose name may or may not be known, may either be joined or not at the pleasure of the creditor (*y*); unless the contract be under seal, in which case, as the deed is itself the contract, and not merely evidence of it (*z*), those only can be sued on it who have sealed and delivered it. In equity, however, in favour of creditors, all partnership debts are considered to be both joint and several. On the decease of a partner, therefore, his estate will be liable in equity to all the partnership debts incurred previous to his decease (*a*); and the creditors may, if they please, resort in the first instance to the estate of the deceased, leaving it to his representatives to recover from the surviving partners their share of the debts (*b*). It seems, however, that in analogy to the rule in bankruptcy, next stated, the separate creditors of the deceased partner would first be paid in full out of the estate, before its application to the payment of any of the debts of the partnership (*c*).

Dormant partner.

Joint and several liability in equity.

(*w*) Stat. 19 & 20 Vict. c. 97, s. 14, not retrospective; *Jackson* v. *Woolley*, 8 E. & B. 784.

(*x*) See *Rice* v. *Shute*, 5 Burr. 2611; 1 Wms. Saund. 291 b, n. (4).

(*y*) *De Mautort* v. *Saunders*, 1 Barn. & Adol. 398; *Beckham* v. *Drake*, 9 Mee. & Wels. 79; 11 Mee & Wels. 315.

(*z*) *Ante*, p. 94.

(*a*) *Devaynes* v. *Noble*, 1 Meriv. 529, 563; 2 Russ. & My. 495.

(*b*) *Wilkinson* v. *Henderson*, 1 M. & Keen, 582; *Braithwaite* v. *Britain*, 1 Keen, 206; *Thorpe* v. *Jackson*, 2 You. & Coll. 553; *Way* v. *Basset*, 5 Hare, 55.

(*c*) *Gray* v. *Chiswell*, 9 Ves. 118; *Brown* v. *Weatherby*, 12 Sim. 6, 10; *Ridgway* v. *Clare*, 19 Beav. 111; *Whittingstall* v. *Grover*, M. R., 10 W. R. 53; *Lodge* v. *Pritchard*, 4 Giff. 294.

Bankruptcy of a trading partnership. Joint and several debts.

In the case of the bankruptcy of a trading partnership, the rule which is always followed in the payment of the debts is, that the joint assets of the firm are in the first place liable to the partnership debts; and that the separate estate of each partner is in the first place liable to his separate debts, which must be paid in full out of such separate estate, before any of it can be applied towards payment of the debts of the partnership (*d*). Any creditor of a partnership may however be a petitioning creditor in respect of his debt, on the bankruptcy of any individual member of the firm; and in that case he will be entitled to a dividend on his debt out of the estate of such bankrupt rateably with his separate creditors (*e*). And the other partnership creditors may prove their debts on such separate bankruptcy in order to have a vote at any meeting of creditors; but they can receive no dividends till the separate creditors have been paid in full (*f*). But if any creditor has a joint and several security, which would enable him, at law, to sue any partner severally, he may, at his option, prove his debt against the separate estate of any such partner instead of against the firm jointly (*g*); but he cannot prove against both together (*h*). The Bankruptcy Act, 1869, provides that where joint and separate properties are being administered, dividends of the joint and separate properties shall, subject to any order to the contrary that may be made by the court on the applica-

(*d*) *Ex parte Elton*, 3 Ves. 238, 241; *Ex parte Kensington*, 14 Ves. 447; *Ex parte Peake*, 2 Rose, 54; *Ex parte Harris*, 1 Mad. 583; *Ex parte Janson*, 3 Mad. 229; *Re Plummer*, 1 Phil. 56; *Ex parte Kennedy*, 2 De Gex, M. & G. 228; *Ex parte Topping*, L. C., 11 Jur., N. S. 210.

(*e*) *Ex parte Ackerman*, 14 Ves. 604; *Ex parte Detastet*, 17 Ves. 247; stat. 32 & 33 Vict. c. 71 s. 100.

(*f*) Stat. 32 & 33 Vict. c. 71, s. 103. A similar provision was contained in stat. 12 & 13 Vict. c. 106, s. 140, repealing stats. 6 Geo. IV. c. 16, s. 62, and 5 & 6 Vict. c. 122, s. 39, to the same effect.

(*g*) *Ex parte Hay*, 15 Ves. 4.

(*h*) *Ex parte Bevan*, 10 Ves. 107; *Ex parte Husbands*, 2 Glyn & Jam. 4.

tion of any person interested, be declared together, and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for and the benefit received by each property (*i*). The rule that the joint assets of the firm are in the first place liable to the partnership debts, applies equally where there has been a change in the partnership previous to the bankruptcy. The stock handed over to the new firm is primarily liable to all the debts incurred by them; and the creditors of the old firm must first have recourse to such assets, if any, as may still belong to the old firm, and cannot touch the property of the new partnership till all its creditors have been fully paid (*k*). The addition or withdrawal of a partner to or from a firm in difficulties may thus occasion serious detriment to its creditors.

Dormant partner.

It has recently been decided that the share of a dormant partner in the assets of the partnership is not goods in the order or disposition of the acting partner with the consent of the true owner thereof, so as to pass to his assignees, or now to the trustee for his creditors, in the event of his bankruptcy (*l*).

Ostensible partner.

The liability to the debts of a partnership may be incurred by being an ostensible partner, although no share of the profits be received. Thus, if a person allow his name to be used as one of a firm (*m*), or to be painted over the door of a shop (*n*), he will be liable to the debts

(*i*) Stat. 32 & 33 Vict. c. 71, s. 104. See the repealed stat. 24 & 25 Vict. c. 134, s. 177.

(*k*) *Ex parte Freeman*, Buck, 471; *Ex parte Fry*, 1 Glyn & Jam. 96; *Ex parte Janson*, 3 Mad. 229; *Ex parte Sprague*, 4 De Gex, Mac. & Gord. 866.

(*l*) *Reynolds* v. *Bowley*, L. R., 2 Q. B. 474; 8 Best & Smith, 406; see *ante*, p. 56.

(*m*) *Parkin* v. *Carruthers*, 3 Esp. 248; *Young* v. *Axtell*, cited 2 H. Black. 242.

(*n*) See *M'Iver* v. *Humble*, 16 East, 169, 174.

Retiring partner.

of the firm; for credit may thus be given to the firm on the strength of his character as a solvent person. On the same principle, if a person have once been known to be a partner in the firm (*o*), his liability to its debts will continue after his withdrawment, unless he takes proper means to inform the creditors that he has ceased to be a partner (*p*). But the circumstance of the name of a deceased partner remaining in the firm will not render his estate liable to the debts of the survivors (*q*). And if a trader direct by his will that his trade shall be carried on by his executor, the executor who ostensibly carries on the trade will be liable for the debts he may thereby incur as fully as if he were carrying on the trade for his own benefit (*r*); but so much only of the estate of the testator will be liable to such debts as he may have directed to be employed in the business (*s*). The rest of the testator's estate is held to be exempt, on the ground of the great inconvenience which would arise from holding it liable after its distribution amongst the legatees. But, in strict principle, this exemption is at variance with the rule next stated, that a liability is incurred by any participation in the profits, which rule, however, has now, as we shall presently see, been abolished by act of parliament.

Deceased partner.

Executor carrying on trade.

Participation in profits.

A liability to the debts of a partnership was until recently incurred by a participation in the profits,

(*o*) *Evans* v. *Drummond*, 4 Esp. 89; *Brooke* v. *Enderby*, 2 Brod. & Bing. 70; 4 Moore, 501; *Carter* v. *Whalley*, 1 Barn. & Adol. 11.

(*p*) *Godfrey* v. *Turnbull*, 1 Esp. 371; *M'Iver* v. *Humble*, 16 East, 169.

(*q*) *Vulliamy* v. *Noble*, 3 Mer. 614; *Webster* v. *Webster*, 3 Swanst. 490, n.

(*r*) 10 Ves. 119. And at law he will be liable, though his name do not appear; *Wightman* v. *Townroe*, 1 Man. & Selw. 412.

(*s*) *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, Buck, 202; *Cutbush* v. *Cutbush*, 1 Beav. 184; *Re Butterfield*, 11 Jurist, 955; *Kirkman* v. *Booth*, 11 Beav. 273; *M'Neillie* v. *Acton*, 4 De Gex, M. & G. 744.

although the circumstance of such participation might be unknown to the creditors (*t*). It was enough that the business was carried on *on behalf of* the participator (*u*). Thus, if a person placed money in a partnership (*x*), or left it there on retiring (*y*), with a stipulation to have a compensation for it, under whatever name, subject to abatement or enlargement as the profits might fluctuate, he was liable as a partner. If, however, he left no money in the concern, but was to receive a compensation for his services, or otherwise, a nice distinction was then drawn between taking a share of the profits as such and taking a per-centage upon, or a salary varying with, the profits. He who took a share of the profits as such was liable as a partner (*z*); but he who took an equivalent in the shape of per-centage or salary, though varying with the profits, escaped the liability (*a*). And if a trading concern were carried on for the benefit of creditors, the creditors were not, from the mere circumstance of their debts being paid out of the profits, liable as partners for the debts incurred (*b*).

Act to amend the law of partnership.

A beneficial change has now been made by the act to amend the law of partnership (*c*). This act provides (*d*), that the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the

(*t*) *Beckham* v. *Drake*, 9 Mee. & Wels. 79; 11 Mee. & Wels. 315.

(*u*) *Kilshaw* v. *Jukes*, 3 B. & S. 847.

(*x*) *Grace* v. *Smith*, 2 Wm. Black. 998, 1001; *Waugh* v. *Carver*, 2 H. Black. 235.

(*y*) *Re Colbeck*, Buck, 48.

(*z*) *Ex parte Rowlandson*, 1 Rose, 89, 91; *Barry* v. *Nesham*, 3 C. B. 641; *Heyhoe* v. *Burge*, 9 C. B. 431; see, however, *Rawlinson* v. *Clarke*, 15 Mee. & Wels. 292.

(*a*) *Ex parte Hamper*, 17 Ves. 403; *Pott* v. *Eyton*, 3 C. B. 32; *Stocker* v. *Brocklebank*, 3 Mac. & Gord. 250.

(*b*) *Wheatcroft* v. *Hickman*, H. of L, 9 C. B., N. S. 47.

(*c*) Stat. 28 & 29 Vict. c. 86, 5th July, 1865.

(*d*) Sect. 1.

profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such. And no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner (*e*). And no person, being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall by reason only of such receipt be deemed to be a partner of or to be subject to any liabilities incurred by such trader (*f*). And no person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business (*g*). But in the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan; nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied (*h*).

(*e*) Stat. 28 & 29 Vict. c. 86, s. 2.
(*f*) Sect. 3.
(*g*) Sect. 4.
(*h*) Sect. 5.

Each partner liable to acts of the other in the ordinary course of business.

When the relation of partners has been established between two or more persons, either ostensibly or by participation in profit, each incurs liability from the acts and dealings of the other in the ordinary course of business. For any one partner may buy, sell (*i*) or pledge goods (*k*); draw (*l*), accept (*m*) or indorse (*n*) bills of exchange and promissory notes; give guarantees (*o*), receive moneys (*p*) and release or compound for debts (*q*) in the name (*r*) and on the account of the firm, in the ordinary course of business. Each partner is also answerable for the fraud of his co-partner in any matter relating to the business of the partnership (*s*). And in like manner notice of any matter relating to the partnership, if given to one partner, is constructively notice to them all (*t*). And any agreement between the partners, by which any one of them may be restrained from doing any act to pledge the credit of the firm, though binding as between themselves, will not be binding on any creditor (*u*) who may not have notice of it (*x*). If,

Notice to one partner is notice to all.

(*i*) *Hyat* v. *Hare*, Comb. 383; *Lambert's case*, Godbolt, 244.

(*k*) *Reid* v. *Hollinshead*, 4 B. & Cress. 867.

(*l*) *Smith* v. *Jarvis*, 2 Ld. Raymond, 1484; *Re Clarke, Ex parte Buckley*, 14 Mee. & Wels. 469; 1 Phil. 562.

(*m*) *Pinkney* v. *Hall*, 1 Salk. 126; 1 Ld. Raym. 175; *Lloyd* v. *Ashby*, 2 B. & Adol. 23.

(*n*) *Swan* v. *Steele*, 7 East, 210; *Vere* v. *Ashby*, 10 Barn. & Cress. 288.

(*o*) *Ex parte Gardom*, 15 Ves. 286; see *Halesham* v. *Young*, 5 Q. B. 833.

(*p*) *Duff* v. *East India Company*, 15 Ves. 198, 213.

(*q*) *Per* Lord Kenyon, 4 T. Rep. 519; *per* Best, C. J., 10 Moore, 393.

(*r*) *Kirk* v. *Blurton*, 9 Mee. & Wels. 284.

(*s*) *Willet* v. *Chambers*, Cowp. 814; *Stone* v. *Marsh*, 6 Barn. & Cress. 551; *Lavell* v. *Hicks*, 2 You. & Coll. 481; *Blair* v. *Bromley*, 5 Hare, 542; 2 Phill. 354.

(*t*) *Per* Lord Ellenborough, 1 Man. & Selw. 259.

(*u*) *Waugh* v. *Carver*, 2 H. Black. 235; *South Carolina Bank* v. *Case*, 8 Barn. & Cress. 427; *Hawken* v. *Bourne*, 8 Mee. & Wels. 703, 710.

(*x*) *Minnit* v. *Whinery*, 5 Bro. Parl. Cas. 489; *Ex parte Darlington District Joint Stock Banking Company, In re Riches*, L. C., 11 Jur., N. S. 122. See also *Hogg* v. *Skeen*, 18 C. B., N. S. 426.

Transactions not in the ordinary course of business.

however, the transaction be not in the ordinary course of the business of the partnership, the other partners will not be liable as such in respect of it. Thus one partner cannot bind the firm by a submission to arbitration (*y*), or by confessing a judgment (*z*); and one partner has ordinarily no authority to execute a deed in the names of the others so as to bind the partnership (*a*). So a farmer carrying on his business in partnership with another would not be liable on a bill of exchange drawn by his partner in the name of the partnership (*b*); neither would a solicitor be liable on a bill drawn by his partner in the name of his firm, though given to secure a partnership debt (*c*); for bill transactions form no part of the ordinary business of either farmers or solicitors. Again, there is no right or power implied by law in any of the directors of a joint-stock company to bind the company by drawing or accepting bills or notes (*d*); and in like manner notice of any matter relating to the business of a joint-stock company given to any member, even a director, is not constructive notice to the company itself (*e*). For joint-stock companies are essentially different from ordinary partnerships. It is not necessary that the directors should have any other power to bind the company by bills or notes than such as may be conferred on them by the charter or articles of association (*f*). And the business of such companies is always carried on at an office for the purpose, and is not, like that of ordinary partnerships, confided to any one individual member.

Directors of joint-stock companies.

(*y*) *Stead* v. *Salt*, 3 Bing. 101; S. C., 10 J. B. Moore, 389.

(*z*) *Hambidge* v. *De la Crouée*, 3 C. B. 742.

(*a*) *Harrison* v. *Jackson*, 7 T. Rep. 207; see *Burn* v. *Burn*, 3 Ves. 573, 578.

(*b*) *Per* Littledale, J , 10 Barn. & Cress. 138.

(*c*) *Hedley* v. *Bainbridge*, 3 Q. B. 316.

(*d*) *Dickinson* v. *Valpy*, 10 Barn. & Cress. 128; *Bramah* v. *Roberts*, 3 N. C. 963.

(*e*) *Powles* v. *Page*, 3 C. B. 16; *Martin* v. *Sedgwick*, 9 Beav. 333.

(*f*) *Balfour* v. *Ernest*, 5 C. B , N. S. 601.

New enactment.

The Companies Act, 1862, now provides, that a promissory note or bill of exchange shall be deemed to have been made, accepted or indorsed on behalf of any company under that act, if made, accepted or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted or indorsed by or on behalf or on account of the company by any person acting under the authority of the company (*g*).

Shareholders in joint-stock companies.

The liability of a shareholder in a joint-stock company to the debts of the company has been already noticed. It varies, as we have seen (*h*), according as the company is incorporated with unlimited liability or with liability limited by shares or by guarantee. The mere circumstance, however, of a person allowing his name to be published as a provisional committee-man of a projected joint-stock company does not confer on the solicitor or secretary of the intended company, or any one else, implied authority to pledge the credit of such person for goods supplied to the company, or work done on its account (*i*). For to agree to become a member of a committee is merely to agree to become one of a body, to whom others have committed a particular duty, and does not constitute an agreement to share with the other members of that body in profit or loss, which is the characteristic of a partnership (*k*).

Provisional committee-man.

(*g*) Stat. 25 & 26 Vict. c. 89, s. 47; and see as to other contracts, stat. 30 & 31 Vict. c. 131, s. 37, *ante*, pp. 236, 237.

(*h*) *Ante*, p. 238.

(*i*) *Reynell* v. *Lewis*, 15 M. & W. 517; *Barker* v. *Stead*, 3 C. B. 946; *Bailey* v. *Macaulay*, 13 Q. B. 815.

(*k*) 15 Mee. & Wels. 529.

CHAPTER III.

OF A WILL.

Growth of right of testamentary alienation.

ALL kinds of personal property may be bequeathed by will. This right, in its present extent, has been of very gradual and almost imperceptible growth; for anciently, by the general common law, a man who left a wife and children could not deprive them by his will of more than one equal third part of his personal property. If, however, he left a wife and no children, or children and no wife, he was then enabled to dispose of half, leaving the other half for the wife or for the children (*a*). This ancient rule, however, gradually became subject to many exceptions, by the customs of particular places, until the rule itself took the place of an exception and became confined to such places as had a custom in its favour. These places, in later times, were the province of York, the principality of Wales, and the city of London; as to all which places, a general power of testamentary disposition was conferred by acts of parliament of William and Mary, Anne and George I. (*b*). And now, by the act for the amendment of the laws with respect to wills (*c*), every person of full age is expressly empowered to bequeath by his will, to be executed as required by the act, all personal estate to which he shall be entitled, either at law or in equity, at the time of his decease.

(*a*) 2 Black. Com. 492; Williams on Executors, pt. 1, bk. 1, ch. 1. See also 1 C. P. Cooper's Reports, p. 539.

(*b*) Stat. 4 & 5 Will. & Mary, c. 2, explained by stat. 2 & 3 Anne, c. 5, for the province of York; stat. 7 & 8 Will. III. c. 38, for Wales; and stat. 11 Geo. I. c. 18, for London. See 2 Bl. Com. 493.

(*c*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 3.

The ecclesiastical courts, as we shall hereafter see, very early acquired the right of determining as to the validity of wills of personal estate; and, in the exercise of this right, they generally followed the rules of the civil law. By this law males at the age of fourteen, and females at the age of twelve, were allowed, if of sufficient discretion, to make a testament (*d*); and the same rule, accordingly, prevailed in this country with respect to wills of personal property (*e*), although, by some authorities, seventeen and even eighteen was said to be the proper age (*f*). The act for the amendment of the laws with respect to wills has, however, now made the law uniform with respect to all wills, whether of real or of personal estate, and has enacted that no will made by any person under the age of twenty-one years shall be valid (*g*).

Age at which a will of personal estate might be made.

No will of a minor now valid.

Personal property was anciently of so little account that a will of it might be made by word of mouth, if proved by a sufficient number of witnesses, as well as by writing; and a will made by word of mouth was termed a nuncupative testament (*h*). By the Statute of Frauds, however, a nuncupative testament, where the estate bequeathed exceeded the value of thirty pounds, was surrounded by so many requirements as to cause its complete disuse (*i*). But no provision was made for guarding the execution of a written will of personal estate; although by the same statute (*k*) a will of real estate was required to be attested by three or four

Nuncupative will.

Statute of Frauds.

(*d*) Inst. lib. 2, tit. 12, s. 1; Dig. lib. 28, tit. 1, s. 5.

(*e*) 2 Bl. Com. 497.

(*f*) Co. Litt. 89 b, n. (6).

(*g*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 7.

(*h*) Wentworth's Executors, 11 *et seq.*; Williams on Executors, pt. 1, bk. 2, ch. 2, s. 6.

(*i*) Stat. 29 Car. II. c. 3, ss. 19—21, explained by stat. 4 Anne, c. 16, s. 14.

(*k*) Sect. 5.

No witness formerly required to a will of personal estate.

witnesses. No attestation, therefore, was required to a will of personal estate, nor was it even necessary that such a will should be signed by the testator. Thus, instructions for a will committed to writing, given by a person who died before the instrument could be formally executed, though such instructions were neither reduced into writing in the presence of the testator, nor even read over to him, have been held to operate as fully as a will itself (*l*). It was, however, provided by the Statute of Frauds, that no will in writing of personal estate should be repealed or altered by word of mouth only, except the same were, in the life of the testator, committed to writing; and, after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least (*m*).

New enactment, two witnesses now required.

By the recent act for the amendment of the laws with respect to wills, every will of personal estate must now be in writing, and signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of *two* or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator (*n*). The act, in fact, requires the same mode of execution and attestation to every will, whether the property be real or personal. But an exception is made in favour of soldiers being in actual military service, that is, on an expedition (*o*), and of mariners and seamen, being at sea, who may dispose of

Exception in favour of soldiers and seamen.

(*l*) *Carey* v. *Askew*, 2 Bro. C. C. 58; S. C., 1 Cox, 241.

(*m*) Stat. 29 Car. II. c. 3, s. 22.

(*n*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9, explained by stat. 15 & 16 Vict. c. 24. See Principles of the Law of Real Property, 168, 169, 4th ed.; 175, 176, 5th ed.; 183, 184, 6th ed.; 187, 7th ed.; 196, 197, 8th ed.; 196, 9th ed.; 198, 10th ed.

(*o*) *Drummond* v. *Parish*, 3 Curt. 522.

their personal estate as they might have done before the making of the act (*p*); a similar exception was contained in the Statute of Frauds (*q*). The wills of soldiers on an expedition may accordingly be made by an unattested writing, or by a mere nuncupative testament or declaration of their will by word of mouth, made before a sufficient number of witnesses. But the wills of petty officers and seamen in the royal navy, and of marines and non-commissioned officers of marines, so far as relates to any wages, pay, prize money or other monies payable by the admiralty, are required by act of parliament (*r*) to be executed in the presence of and to be attested by a commissioned officer or certain other officers or persons mentioned in the act; and the wills of such persons are also guarded by other requisitions in order to prevent their being imposed upon. And by the Merchant Shipping Act, 1854, it is now provided that the Board of Trade may, in its discretion, refuse to pay or deliver the wages or effects of any deceased merchant seaman to any person claiming to be entitled thereto under any will made on board ship, unless such will is in writing and is signed or acknowledged by the testator in the presence of the master or first or only mate of the ship, and is attested by such master or mate. And the Board may, in its discretion, refuse to pay or deliver any such wages or effects to any person, not being related to the testator by blood or marriage, who claims to be entitled thereto under a will made elsewhere than on board ship, unless such will is in writing and is signed or acknowledged by the testator in the presence of two witnesses, one of whom is some shipping master appointed under the act, or some minister or officiating minister or curate of the place in

Seamen in the royal navy and marines.

Merchant seamen.

(*p*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 11.

(*q*) Stat. 29 Car. II. c. 3, s. 23.

(*r*) Stat. 28 & 29 Vict. c. 72, superseding stats. 11 Geo. IV. & 1 Will. IV. c. 20, ss. 48—51; 7 Will. IV. & 1 Vict. c. 26, s. 12.

which the same is made, or, in a place where there are no such persons, some justice of the peace, or some British consular officer, or some officer of customs, and is attested by such witnesses (*s*). By the act to amend the laws with respect to wills it is provided, that no will or codicil, or any part thereof, shall be revoked, otherwise than by the marriage of the testator or testatrix (which will of itself effect a revocation (*t*)), or by another will or codicil executed in the manner thereby required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is thereby required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same (*u*).

Revocation of a will.

Domicile.

A will of personal estate was formerly required to be made according to the law of the domicile of the testator at the time of his decease (*v*). A person's domicile is the place which he makes his home. But with regard to many persons the circumstances connected with their change of residence are such as to render it an exceedingly difficult question of fact,—what country is their domicile at any given time (*x*). In order to remedy the inconveniences thus occasioned, it is provided by a recent act (*y*), that with regard to persons who may die after the 6th of August, 1861, the date of the act, every testamentary instrument made out of the United Kingdom by a British subject, whatever may be his domicile

New enactment.

(*s*) Stat. 17 & 18 Vict. c. 104, s. 200.

(*t*) Stat. 7 Will IV. & 1 Vict. c. 26, s. 18. See Principles of the Law of Real Property, 153, 1st ed.; 163, 2nd ed.; 170, 3rd ed.; 171, 4th ed.; 179, 5th ed.; 187, 6th ed.; 191, 7th ed.; 200, 8th and 9th eds.; 202, 10th ed.

(*u*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 20.

(*v*) *Stanley* v. *Bernes*, 3 Hagg. 373.

(*x*) See *Douglas* v. *Douglas*, Law Rep., 12 Eq. 617, and the cases there cited.

(*y*) Stat. 24 & 25 Vict. c. 114.

at the time of making it, or at his death, shall, as regards personal estate, be held to be well executed for the purpose of being admitted to probate, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin (*z*). It is further provided (*a*) that every testamentary instrument made within the United Kingdom by any British subject, whatever may be his domicile at the time of making the same, or at his death, shall, as regards personal estate, be held to be well executed, and shall be admitted to probate, if the same be executed according to the forms required by the laws of that part of the United Kingdom where the same is made. And no testamentary instrument is to be revoked or to become invalid, nor is the construction thereof to be altered, by reason of any subsequent change of domicile of the person making the same (*b*). Another act of parliament, passed on the same day (*c*), provides that whenever her Majesty shall, by convention with any foreign state, agree that provisions to the effect of the enactments therein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, her Majesty may by order in council direct that, after the publication of such order in the "London Gazette," no British subject resident at the time of his death in the foreign country named in such order shall be deemed, under any circumstances, to have acquired a domicile in such country, unless he shall have been resident in such country for one year immediately preceding his decease, and shall also have made and deposited in a public office of such foreign

Further enactment.

(*z*) Stat. 24 & 25 Vict. c. 114, s. 1.
(*a*) Sect. 2.
(*b*) Sect. 3.
(*c*) Stat. 24 & 25 Vict. c. 121.

country (such office to be named in the order in council) a declaration in writing of his intention to become domiciled in such foreign country. And any British subject dying resident in such foreign country, but without having so resided, and made such declaration as aforesaid, shall be deemed, for all purposes of testate or intestate succession as to moveables, to retain the domicile he possessed at the time of his going to reside there (*d*). Similar provisions may be made, after any such convention, with regard to the subjects of such foreign country dying in Great Britain (*e*). But this act is not to apply to any foreigners who may have obtained letters of naturalization in any part of her Majesty's dominions (*f*).

Donatio mortis causâ.

Connected with the subject of wills is that of donations mortis causâ, which may here be noticed. A donation mortis causâ is a gift made in contemplation of death, to be absolute only in case of the death of the giver (*g*). Being a gift, it can be made only of chattels, the property in which passes by delivery (*h*); although a bond debt has, contrary to this principle (*i*), been allowed to pass by way of donation mortis causâ by delivery of the bond (*k*). And a policy of life assurance has also recently been held a proper subject for such a gift (*l*), also bills or notes though payable to order and unindorsed (*m*). An actual or constructive delivery of the

(*d*) Stat. 24 & 25 Vict. c. 121, s. 1.

(*e*) Sect. 2.

(*f*) Sect. 3.

(*g*) Inst. tit. 7, De Donationibus, cited by Lord Loughborough, in *Tate* v. *Hilbert*, 2 Ves. jun. 119; *Walter* v. *Hodge*, 2 Swanst. 99.

(*h*) See *ante*, p. 34; *Miller* v. *Miller*, 3 P. Wms. 356.

(*i*) *Duffield* v. *Elwes*, 1 Sim. & Stu. 244.

(*k*) *Snellgrove* v. *Baily*, 3 Atk. 214; and see *Boutts* v. *Ellis*, 4 De Gex, M. & G. 249; *Moore* v. *Darton*, 4 De Gex & Smale, 517.

(*l*) *Witt* v. *Amis*, 1 Best & Smith, 109.

(*m*) *Veal* v. *Veal*, 27 Beav. 303; *Rankin* v. *Weguelin*, 27 Beav. 309. As to cheques, see *Hewitt* v. *Kaye*, L. R., 6 Eq. 198, M. R.; *Bromley* v. *Brunton*, L. R., 6 Eq. 275, V.-C. S.

subject of gift to the donee is essential to a donation mortis causâ (*n*); it must also be made in expectation of the donor's decease (*o*), and must be on condition that the gift be absolute only on that event (*p*). It is no objection, however, that the donation is clogged with a trust to be performed by the donee (*q*). A donation mortis causâ is revocable by the donor during his life (*r*), and after his decease it is subject to his debts (*s*), and also to legacy duty (*t*).

Appointment of executor formerly essential.

The mode of operation of a will of personalty is essentially different from the operation of a will of lands in this respect, that in strictness the appointment of an executor was formerly essential to a will of personalty (*u*); and, at the present day, the usual and proper method is to appoint an executor as to the personal estate; whereas under a devise of landed property, the lands pass at once to the devisee, and the intervention of an executor is quite unnecessary and inapplicable (*v*). The executor of a will of personal estate becomes entitled, from the moment of the death of the testator, to all his personal property (*x*), which after payment of the debts of the deceased he is bound to apply according to the directions of the will. Thus if the testator should specifically bequeath any part of his personal property, the property

Executor entitled to all personal property of testator.

Executor's assent.

(*n*) *Wood* v. *Turner*, 2 Ves. sen. 431; *Bryson* v. *Brownrigg*, 9 Ves. 1; *Bunn* v. *Markham*, 7 Taunt. 224; *Ruddell* v. *Dobree*, 10 Sim. 214; *Farquharson* v. *Cave*, 2 Coll. 356; *Powell* v. *Hellicar*, 26 Beav. 261.

(*o*) *Tate* v. *Hilbert*, 2 Ves. jun. 111; 4 Bro. C. C. 286.

(*p*) *Edwards* v. *Jones*, 1 My. & Craig, 226; *Staniland* v. *Willott*, 3 Mac. & Gord. 664.

(*q*) *Blount* v. *Burrow*, 4 Bro. C. C. 72; *Hills* v. *Hills*, 8 Mee. & Wels. 401.

(*r*) 7 Taunt. 232.

(*s*) 1 P. Wms. 406; 2 Ves. sen. 434.

(*t*) Stat. 36 Geo. III. c. 52, s. 7; 8 & 9 Vict. c. 76, s. 4.

(*u*) Wentworth's Executors, 3, 4, 14th ed.; 2 Bla. Com. 503.

(*v*) *In the goods of Barden*, Law Rep., 1 Probate and Divorce Cases, 325.

(*x*) Co. Litt. 388 a; Com. Dig. tit. Biens (C); Williams on Executors, pt. 2, bk. 2.

so bequeathed will not belong absolutely to the legatee until the executor has assented to the bequest; and this assent must not be given until the executor is satisfied that there is sufficient to pay the debts of the deceased without having recourse to the property so specifically given (*y*).

Administrator *durante minore ætate.*

Married woman executrix.

If the testator should appoint as his sole executor an infant under the age of twenty-one years, such infant will not be allowed to exercise his office during his minority; but during this time the administration of the goods of the deceased will be granted to the guardian of the infant, or to such other person as the Court of Probate may think fit (*z*). Such person is called an administrator *durante minore ætate* (*a*). If a married woman should be appointed an executrix, she cannot accept the office without the consent of her husband (*b*), and having accepted it with his consent, she is unable, without his concurrence, to perform any act of administration which may be to his prejudice; whilst he, on the other hand, may release debts due to the deceased, or make assignment of the deceased's personal estate, without his wife's concurrence (*c*); for as the general rule of law is that a husband and wife are but one person, the power, and with it the responsibility, are vested in the husband. Nevertheless, a married woman, being an executrix, may make a will without the consent of her husband, confined to the personal estate of which she is executrix (*d*); and the executor of her will so made will be the executor of the original testator. For it is a general rule, that if any executor should die before having completely administered the estate of his

Executor of executor entitled to be executor of testator.

(*y*) Toller's Executors, bk. 3, s. 2; Williams on Executors, pt. 3, bk. 3, ch. 4, s. 3.

(*z*) Stat. 38 Geo. III. c. 87, s. 6.

(*a*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 3.

(*b*) Williams on Executors, pt. 1, bk. 3, ch. 1.

(*c*) Ibid. pt. 3, bk. 1, ch. 4; 5 Rep. 27 b.

(*d*) Ibid. pt. 1, bk. 2, ch. 1, s. 2.

testator, the executor appointed by the will of such executor will be entitled to complete the distribution of the estate of the former testator (*e*).

The testator however may, and usually does, appoint more than one person his executors. In this case the law regards all the co-executors as one individual person; and consequently any one of the executors of full age may, during the life of his companions, perform, without their concurrence, all the ordinary acts of administration, such as giving receipts, making payments, and selling and assigning the property (*f*). But all the executors, infants included, must join in bringing actions respecting the estate (*g*). If, therefore, the testator appoint a person indebted to him as his executor, or one of his executors, this appointment will operate at law as a release of the debt (*h*). For the debt is a chose in action, and a man cannot either solely or conjointly with others bring an action against himself. In equity, however, an executor who was indebted to the testator is bound to account for his debt to the estate of the testator (*i*). On the decease of any co-executor, the office survives to those who remain; and until recently, if one of them should have renounced the executorship in the lifetime of his companions, he might at any time have changed his mind and undertaken the office. But if, having survived all his companions, he should then

Any one of the executors may perform acts of administration.

All must join in bringing action.

Appointment of debtor executor.

Survivorship of office of executor.

Renunciation by one in lifetime of others.

(*e*) 2 Bla. Com. 506. And it seems that he is bound to do so; *Brooke* v. *Haynes*, Law Rep., 6 Eq. 25, M. R.

(*f*) Shep. Touch. 484.

(*g*) Williams on Executors, pt. 2, bk. 1, ch. 2. An ejectment was an exception, as any one executor might demise the entirety of the testator's leasehold land. *Doe* d. *Stace* v. *Wheeler*, 15 Mee. & Wels. 623. But see now stat. 15 & 16 Vict. c. 76, ss. 168 *et seq.*

(*h*) Wentworth's Executors, 73, 14th ed.; *Freakley* v. *Fox*, 9 B. & Cress. 130.

(*i*) Bac. Ab. tit. Executors and Administrators (A), 10; *Simmons* v. *Gutteridge*, 13 Ves. 264.

have renounced (*j*), or, if, without such renunciation, administration should have then been granted to another person (*k*), he could not afterwards have interfered. It is however now provided by the Court of Probate Act, 1857, that where any person after the commencement of that act (*l*), (which was fixed by Order in Council for the 11th of January, 1858,) renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his effects shall, without any further renunciation, go, devolve and be committed in like manner, as if such person had not been appointed executor (*m*). And by a subsequent act the same effect is produced whenever an executor named in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate and does not appear to such citation (*n*). When two or more executors prove, the executor of the will of the survivor of them will, after the decease of all of them, be entitled to act as executor of their testator.

Rights of executor now cease on his renouncing;

or dying before probate.

Executor *de son tort.*

If any person not duly authorized should intermeddle with the goods of the testator, or do any other act relating to the office of executor, he thereby becomes an executor of his own wrong, or, as it is called in law French, an executor *de son tort.* Such an executor is liable to the same demands from the creditors of the deceased as if he had been regularly appointed; but like a regular executor he is not liable beyond the amount of

(*j*) *Hensloe's case*, 9 Rep. 36; *Cresswick* v. *Woodhead*, 4 Man. & Gran. 811.

(*k*) *Venables* v. *East India Company*, 2 Ex. Rep. 633.

(*l*) *In the goods of Witham*, Law Rep., 1 Probate, 303.

(*m*) Stat. 20 & 21 Vict. c. 77, s. 79.

(*n*) Court of Probate Act, 1858, 21 & 22 Vict. c. 95, s. 16.

the assets of the testator which have come to his hands. The chief difference between such an executor and one who has been duly appointed is this, that an executor *de son tort* is not allowed to derive any benefit from his own wrongful intermeddling; whereas a regularly appointed executor, if a creditor of the deceased, may lawfully retain his own debt out of the assets in preference to all other debts of the same degree (*o*).

The most striking difference between a will of personal estate and a will of lands yet remains to be noticed. A will of lands has always operated and still operates as a mode of conveyance requiring no extrinsic sanction to render it available as a document of title. But a will of personal estate has always required to be proved. This probate of the will was until recently required to be made in some ecclesiastical court. But by the Court of Probate Act, 1857 (*p*), the jurisdiction of all the ecclesiastical courts over wills was entirely abolished, and a court was established called the Court of Probate, with a principal registry in London and district registries throughout the kingdom, in which all wills of personal estate are now required to be proved. In this court the will itself is deposited, and a copy of the will, which is given by the court to the executor on proving, denominated the probate copy, is the only proper evidence of the right of the executor to intermeddle with the personal estate of his testator (*q*). Before probate, however, the executor may perform all the ordinary acts of administration, such as receiving and giving receipts for debts due to the testator, paying the debts owing by the testator, and selling and assigning any part of the personal estate. But when evidence is required of his

A will of personalty must be proved.

Court of Probate.

The probate the only proper evidence.

Acts of executor before probate.

(*o*) Williams on Executors, pt. 1, bk. 3, ch. 5; pt. 3, bk. 2, ch. 2, s. 6.

(*p*) Stat. 20 & 21 Vict. c. 77, amended by stat. 21 & 22 Vict. c. 95.

(*q*) *Rex* v. *Netherseal*, 4 T. R. 260; Wms. Ex. pt. 1, bk. 4, ch. 1.

right to intermeddle, the probate is the only valid proof; without it, therefore, no action or suit can be maintained, although proceedings may be commenced before, and carried up to the point where the evidence is required (*r*).

Ecclesiastical jurisdiction over wills.

The jurisdiction of the ecclesiastical courts over wills of personal estate is of a very ancient origin. The probate of wills of personalty, as a means of their authentication, appears to have been in use from the very earliest times. The first persons by whom probate was granted were said to be the lords of manors; and some vestiges of this ancient right long remained in the case of one or two manors, the lords of which retained such a jurisdiction (*s*) until abolished by the Court of Probate Act, 1857 (*t*). But so early as the time of Glanville, who wrote in the reign of Henry II., the ecclesiastical courts had acquired an exclusive right to determine on the validity of a will or the bequest of a legacy (*u*). And from this period the right of the church to interfere in testamentary matters became gradually settled, though not without much opposition on the part of the temporal lords.

In what court probate should have been taken out.

Bona notabilia.

A will was required to be proved in the court of the bishop or ordinary in whose diocese the testator dwelt, and within whose jurisdiction the personal effects of the testator consequently lay. But if there were effects to the value of 5*l.*, called *bona notabilia*, in two distinct dioceses or jurisdictions within the same province, either of Canterbury or York, the will was required to be proved in the Prerogative Court of the archbishop of

(*r*) Williams on Executors, pt. 1, bk. 4, ch. 1, s. 2; *Stuart* v. *Burrowes*, 1 Drury, 265, 274.

(*s*) Wentworth's Ex. 14th ed. 99, 100; Toller's Executors, 50.

(*t*) Stat. 20 & 21 Vict. c. 77, s. 3.

(*u*) Glanville, lib. 7, cc. 6, 7; 1 Reeves's Hist. Eng. Law, 72.

that province (*x*). If there were personal effects within two provinces, the will must have been proved in each province, either in the Prerogative Court, or in some court of inferior jurisdiction; observing, as to each province, the same rule as would have applied had the testator had no property elsewhere (*y*). If probate were granted by a bishop, or other inferior judge, in a case where the deceased had goods to the value of 5*l.* in any other diocese in the same province, such probate was absolutely void; but probate granted by an archbishop, in a case where the deceased had not *bona notabilia* in divers dioceses, was voidable only, and not absolutely void (*z*). But the Court of Probate Act, 1857, now renders valid all grants of probates which were void or voidable by reason only that the courts from which they were obtained had not jurisdiction to make such grants, except where the same had been already litigated (*a*). And any will may now be proved in the principal registry of the Court of Probate without regard to the abode of the testator (*b*). But if the testator had, at the time of his death, a fixed place of abode within any district, his will may be proved in the registry of that district (*c*); and the grant so made will be effectual even if the testator should not have had any fixed place of abode within that district (*d*).

Probate void.

Voidable.

Now valid.

Probate in principal registry.

In district registry.

The evidence required for the proof of a will varies according to the form of the attestation, and also according to the circumstance of the validity of the will

Evidence required on probate.

(*x*) Williams on Executors, pt. 1, bk. 4, ch. 2. For an account of the rise of the archbishop's jurisdiction, see Gent. Mag. new series, vol. 12, p. 582.

(*y*) Second Report of Real Property Commissioners, 67.

(*z*) Wentworth's Executors, 110, 14th ed.; *Lysons* v. *Barrow*, 2 Bing. N. C. 486.

(*a*) Stat. 20 & 21 Vict. c. 77, s. 86; *In the goods of Tucker*, 2 Sw. & Trist. 123; 9 W. R. 420.

(*b*) Stat. 20 & 21 Vict. c. 77, s. 59.

(*c*) Sect. 46.

(*d*) Sect. 47.

being or not being disputed. The usual and proper form of attestation to a will expresses that the formalities required by the Wills Act (*e*) have been complied with; thus, "Signed and declared by the above-named A. B., the testator, as and for his last will and testament, in the presence of us, both present at the same time, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses." When the attestation is in this form, and the validity of the will is not disputed, it is *proved* by the simple oath of the executor, that he believes the will to be the true last will and testament of the deceased. But as such a form of the attestation clause is not essential to the validity of the will (*f*), wills are sometimes informally made without any clause of attestation, or with a clause which does not express that the required formalities have been complied with. When this occurs, an affidavit, in addition to the executor's oath, is required from one of the subscribing witnesses, that the will was executed in compliance with the statute (*g*). Probate in either of the above modes is termed probate in *common form*. But if the validity of the will should be disputed, or any dispute should be anticipated by the executor, the will is proved *in solemn form per testes*. In this case both the witnesses are sworn and examined, and such other evidence taken as the circumstances require, in the presence of the widow and next of kin of the testator, and all others pretending to have any interest, who are cited to be present to see the proceedings. When a will has once been proved in this form it is finally established, and the exe-

Probate in common form;

in solemn form.

(*e*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9, *ante*, p. 336.

(*f*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9.

(*g*) Williams on Executors, pt. 1, bk. 4, ch. 3, s. 3. The practice of the Court of Probate is generally the same as the old practice of the Prerogative Court of the Archbishop of Canterbury; stat. 20 & 21 Vict. c. 77, s. 29.

cutor cannot be compelled to prove it any more; but when a will has been proved merely in common form, the executor may, at any time within thirty years, be compelled by any party interested to prove it *per testes* in solemn form (*h*). The contentious jurisdiction with respect to the grant and revocation of probates of wills has been transferred to the county courts in cases where the personalty is under the value of 200*l.*, and the deceased was not at the time of his death beneficially entitled to any real estate of the value of 300*l.* (*i*).

County courts.

Probates of wills are required by act of parliament to be stamped with an ad valorem duty according to the value of the personal estate of the testator, (*j*) whenever it exceeds 100*l.* (*k*). The effects of the testator within the jurisdiction of the spiritual judge granting probate were formerly alone valued for this purpose (*l*). But it is now provided that probate shall be granted in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom (*m*). And provisions have been made for extending to England, Scotland and Ireland respectively probates granted by the courts of probate which have now been established in England and Ireland, and confirmations, as they are called, of executors in Scotland (*n*). A recent act of parliament provides that all Indian government promissory notes and certificates issued or stock created in lieu thereof, being assets of a deceased

Stamp duties on probates.

Indian government notes.

(*h*) Williams on Executors, pt. 1, bk. 4, ch. 3, s. 4.

(*i*) Stat. 21 & 22 Vict. c. 95, s. 10.

(*j*) Stats. 55 Geo. III. c. 184; 5 & 6 Vict. c. 79, s. 23; 22 & 23 Vict. c. 36, s. 1.

(*k*) Stat. 27 & 28 Vict. c. 56, s. 5.

(*l*) *Attorney-General* v. *Hope*, 2 Cl. & Fin. 84; *Attorney-General* v. *Bouwens*, 4 Mee. & Wels. 171.

(*m*) Stat. 21 & 22 Vict c. 56, s. 15. As to ships at sea, see stat. 27 & 28 Vict. c. 56, s. 4.

(*n*) Stat. 20 & 21 Vict. c. 79, ss. 94, 95; 21 & 22 Vict. c. 56, ss. 12, 13, 14; 21 & 22 Vict. c. 95, s. 29.

person, the interest whereon shall be payable in London by drafts payable in India, and which at the decease of the owner thereof shall have been registered in the books of the secretary of state in council in London, or in the books of the governor and company of the Bank of England, or shall have been enfaced in India for the purpose of being so registered before the decease of the owner thereof, and all Indian government promissory notes issued with coupons attached, which, under such regulations and conditions as may be determined from time to time by the secretary of state in council, shall be so registered, and all certificates issued or stock created in lieu thereof, shall be deemed and taken to be personal estate and bona notabilia of such deceased person in England; and probate or letters of administration in England, or confirmation granted in Scotland and sealed with the seal of the principal court of probate in England, shall be sufficient to constitute the persons therein named the legal personal representatives of the deceased with respect to such notes and money as aforesaid (*o*). Probates of wills operating merely in exercise of powers of appointment over property of which the deceased had no ownership, were formerly held to be exempt from probate duty in respect of the value of the property appointed (*p*). But it is now provided, that probate duty shall be paid in respect of all the personal or moveable estate and effects which any person dying after the 3rd of April, 1860, shall have disposed of by will under any authority enabling such person to dispose of the same as he or she shall think fit (*q*). The distribution of the effects of officers and soldiers dying on service is provided for by the

Powers of appointment.

New enactment: probate duty now payable.

Officers and soldiers dying on service.

(*o*) Stat. 23 Vict. c. 5, s. 1. As to bonds and specialties, see stat. 25 Vict. c. 22, s. 39.

(*p*) *Platt* v. *Routh*, 6 Mee. & Wels. 756; 3 Beav. 257; affirmed in the House of Lords, *Drake* v. *Attorney-General*, 10 Cl. & Fin. 257.

(*q*) Stat. 23 Vict. c. 15, s. 4.

Regimental Debts Act, 1863 (*r*). Exemptions from probate duty have been made by parliament in favour of the effects of common seamen, marines and soldiers, who may be slain or die in the queen's service (*s*). And pay, wages, prize money or pensions due to deceased naval officers, marines, seamen and others employed in the navy, whose whole assets shall not exceed thirty-two pounds, are allowed to be paid out without probate of their wills (*t*). And the exemptions thus made have recently been extended to all persons to whom any sum of money, not exceeding one hundred pounds, may be payable by a public department in respect of civil pay or allowances, or annuities granted under authority of parliament (*u*). And in the case of any civil or military allowances chargeable to the army votes, and of army prize money, the existing exemptions are extended to the sum of one hundred pounds (*v*). Probates of the wills of petty officers and seamen in the royal navy and of marines and non-commissioned officers of marines are placed by act of parliament under the care of an officer called the inspector of seamen's wills, and are subject to special regulations made to prevent frauds on persons proverbially careless and liable to imposition (*x*). And with respect to merchant seamen, the Merchant Shipping Act, 1854, now provides, that if the money and effects of any such seamen do not exceed in value the sum of 50*l*., probate may be dispensed with at the discretion of the Board of Trade (*y*). The probate duty is in the first place paid on the whole value of the

Seamen, &c.

Civil service.

Seamen's wills.

(*r*) Stat. 26 & 27 Vict. c. 57; and see the Army Prize (shares of deceased) Act, 1864, stat. 27 & 28 Vict. c. 36.

(*s*) Stat. 55 Geo. III. c. 184.

(*t*) Stat. 4 & 5 Will. IV. c. 25, s. 8.

(*u*) Stat. 31 & 32 Vict. c. 90, s. 1.

(*v*) Sect. 2.

(*x*) Stat. 11 Geo. IV. & 1 Will. IV. c. 20, ss. 55—58, amended by stat. 2 & 3 Will. IV. c. 40, ss. 12, 13; 4 & 5 Will. IV. c. 25, s. 8; Williams on Executors, pt. 1, bk. 4, ch. 4; bk. 5, ch. 2, s. 4.

(*y*) Stat. 17 & 18 Vict. c. 104, s. 199.

personal estate of the testator without allowing for his debts; and after the debts are paid, a return of part of the probate duty is made according to the value to which the estate may be reduced by the payment of the debts. But where leasehold estates are the sole security by way of mortgage, for any debts due from the deceased, the amount of such mortgage debts may be deducted from the value of the said leasehold estates (*z*). As some persons attempted to evade probate duty by means of voluntary bonds to take effect at their decease, in lieu of legacies, it is now provided that no return of probate duty shall be made in respect of any voluntary debt due from any person dying after the 28th of June, 1861, which shall be expressed to be payable on the death of such person, or payable under any instrument which shall not have been bonâ fide delivered to the donee thereof three months before the death of such person (*a*).

Mortgage of leaseholds.

Voluntary debts.

When the will has been proved, it is the duty of the executor to pay the testator's debts out of the personal estate, to which such executor becomes entitled by virtue of his office. For this purpose the executor has reposed in him by the law the fullest powers of disposition over the personal estate of the deceased, whatever may be the manner in which it has been bequeathed by the will (*b*). And in the event of a sale of any such property by the executor, the purchaser is not bound to inquire whether there are any debts remaining unpaid; for, in the absence of evidence to the contrary, the executor is presumed to be acting in the proper discharge of his office (*c*). Nor is the purchaser at all

Payment of debts.

Powers of executors.

Purchaser from executor not bound to inquire if there be debts.

Nor to see to

(*z*) Stat. 31 & 32 Vict. c. 124, s. 7.

(*a*) Stat. 24 & 25 Vict. c. 92, s. 3.

(*b*) *Ewer* v. *Corbet*, 2 P. Wms. 148; *Russell* v. *Plaice*, 18 Beav. 21.

(*c*) *Nugent* v. *Gifford*, 1 Atk. 463; *Elliot* v. *Merriman*, 2 Atk. 42.

concerned with the application which the executor may make of the purchase-money; but the executor's receipt will be a sufficient discharge, and he alone will be responsible to the creditors and legatees for its due application (*d*). The order in which debts ought to be paid out of the personal estate of a deceased debtor has been already noticed in the chapter on debts (*e*); and it has also been stated that the executor, if a creditor, is entitled to retain his own debt in preference to all others of the same degree (*f*). the application of his purchase-money.

When the will has been executed after the 28th of August, 1860, or has been confirmed or revived by a codicil executed after that date, the executors are empowered to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security real or personal for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition, releases and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby (*g*). Power to executors to compound debts, &c.

And the executors are now empowered immediately, or at any time after probate, to apply to the Court of Chancery for an order to be made upon motion or petition of course, or by the judge at chambers, referring it to the chief clerk of the judge to take an account of the debts and liabilities affecting the personal estate of the deceased and to report thereon; and after any such Accounts may be taken by the Court of Chancery.

(*d*) *Whale* v. *Booth*, 4 T. Rep. 625, n.; *M'Leod* v. *Drummond*, 17 Ves. 154.

(*e*) *Ante*, pp. 104, 108, 112, 113.

(*f*) *Ante*, p. 345.

(*g*) Stat. 23 & 24 Vict. c. 145, s. 30.

order shall have been made, proceedings at law by the creditors against the executors may be restrained or suspended by the court until the account directed by such order shall have been taken (*h*).

Legacies. Executor's year.

When the debts have been paid, the legacies left by the testator are then to be discharged. In order to give the executor sufficient time to inform himself of the state of the assets and to pay the debts of the deceased, he is allowed a twelvemonth from the date of the death of the testator before he is bound to pay any legacies (*i*). From this time all such general legacies as remain unpaid carry interest, at the rate of four per cent. per annum (*j*). Notwithstanding the lapse of a year from the testator's death, the executor, however, is still liable to any creditor of the deceased to the amount of the assets which have come to the executor's hands (*k*); and if he should have paid any legacies in ignorance of the claims of the creditor, his only remedy is to apply to the legatees to refund their legacies, which they will be bound to do, in order to satisfy the debt (*l*). From this liability to creditors, an executor could not until recently have been discharged, unless he threw the property into chancery, in which case the court undertakes the administration, and the executor is consequently exonerated from all risk (*m*). But a recent act exonerates executors from all liability to the rents and covenants of any leasehold or other property liable to rents or covenants after an assignment made by him to a purchaser, provided he shall have set apart a sufficient fund to answer any future claim in respect of any fixed

Liability of executor.

New enactment: protection to executors.

(*h*) Stats. 13 & 14 Vict. c. 35, s. 19; 23 & 24 Vict. c. 38, s. 14.

(*i*) *Ward* v. *Penoyre*, 13 Ves. 333; *Benson* v. *Maude*, 6 Madd. 15.

(*j*) *Ward* v. *Penoyre*, ubi sup.

(*k*) *Norman* v. *Baldry*, 6 Sim. 621; *Knatchbull* v. *Fearnhead*, 3 My. & Cr. 122; *Hill* v. *Gomme*, 1 Beav. 540.

(*l*) *March* v. *Russell*, 3 My. & Cr. 31.

(*m*) 3 Myl. & Cr. 126.

and ascertained sum agreed by the lessee or grantee to be laid out on the property (*n*). And it is further provided, that where an executor shall have given the like notices as would have been given by the Court of Chancery in an administration suit, for creditors and others to send in their claims against the estate of the testator, the executor may distribute the assets amongst the parties entitled, without liability to any person of whose claim he shall not have had notice at the time of distribution (*o*). The executor is of course not answerable to the testator's creditors beyond the amount of assets which have come to his hands (*p*), unless he should for sufficient consideration give a written promise to pay personally (*q*), or should do any act amounting to an admission that he has assets of the testator sufficient for the payment of the debts (*r*).

Not liable beyond amount of assets.

On the payment or delivery of any legacy of the amount or value of 20*l.* or upwards, whether payable out of the estate of the testator, real or personal, or out of any real or personal estate over which he had a power of appointment (*s*), a receipt must be given by the legatee, which is chargeable with a duty, called the legacy duty, on the amount or value of the legacy (*t*). But no sum of money, which by any marriage settlement is subjected to any limited power of appointment to or for the benefit of any person or persons therein

Legacy duty.

Exemption.

(*n*) Stat. 22 & 23 Vict. c. 35, ss. 27, 28. This act extends to leases made before it passed; *Smith* v. *Smith*, 1 Drew. & Smale, 684; *Re Green*, 2 De Gex, F. & J. 121.

(*o*) Stat. 22 & 23 Vict. c. 35, s. 29; *Clegg* v. *Rowland*, V.-C. M., Law Rep., 3 Eq. 368; 36 L. J., N. S., Chan. 137.

(*p*) Bac. Abr. tit. Executors; (P), 1.

(*q*) Stat. 29 Car. II. c. 3, s. 4; *ante*, p. 83; 1 Wms. Saund. 210, n. (1); 211, n. (2).

(*r*) *Horsley* v. *Chaloner*, 2 Ves. sen. 83.

(*s*) Stat. 8 & 9 Vict. c. 76, s. 4; *Attorney-General* v. *Marquis of Hertford*, 3 Ex. Rep. 670.

(*t*) Stat. 36 Geo. III. c. 52, s. 27.

specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such person or persons, is liable to legacy duty under the will in which such sum is appointed or apportioned in exercise of such limited power (*u*). The amount of legacy duty varies according to the degree of relationship which the legatee bore to the deceased. Where the legacy is to a child or lineal descendant, or to the father or mother or any lineal ancestor of the deceased, the duty is one per cent. If to a brother or sister, or any descendant of a brother or sister, the duty is three per cent. If to a brother or sister of the father or mother of the deceased, or any descendant of such brother or sister, five per cent. If to a brother or sister of a grandfather or grandmother of the deceased, or any descendant of such brother or sister, six per cent. And if the legacy be to any person in any other degree of collateral consanguinity to the deceased, or to any stranger in blood, the duty is ten per cent. (*v*). But where any person chargeable with legacy duty shall have been married to any wife or husband of nearer consanguinity than himself or herself to the deceased, the same rate of duty only is payable as such his or her wife or husband would have been chargeable with if she or he had taken the same (*w*). And the husband or wife of the deceased are exempt from all legacy duty, and so also are the royal family. By the Succession Duty Act, 1853, leasehold property, although personal estate, is exempted from legacy duty, and is charged in lieu thereof with a succession duty, calculated upon the same principles as the duty on real property (*x*).

Amount of duty.

Leasehold property.

(*u*) Stat. 8 & 9 Vict. c. 76, s. 4.
(*v*) Stat. 55 Geo. III. c. 184.
(*w*) Stat. 16 & 17 Vict. c. 51, s. 11.
(*x*) Stat. 16 & 17 Vict. c. 51, ss. 1, 19, 21. See Principles of the Law of Real Property, 240, 4th ed.; 249, 5th ed.; 259, 6th

Legacy to infant or person beyond seas.

If a legacy be given to an infant, or to a person absent beyond the seas, the only way in which the executor can obtain a proper discharge for such legacy is by payment of it, after deducting the legacy duty, into the Bank of England, with the privity of the paymaster-general, on whom the duties of the accountant-general of the Court of Chancery have lately been cast (*y*), to be placed to the account of the person for whose benefit the same shall be so paid. The money is then laid out by the paymaster-general in the purchase of consols, which, with the dividends thereon, are afterwards transferred and paid to the person entitled, or otherwise applied for his benefit, on application to the Court of Chancery by petition or motion in a summary way (*z*).

Legacy duty on annuities.

The legacy duty on annuities for lives is fixed by tables given in the Succession Duty Act, and is payable by four equal payments, to be made successively on completing each of the first four years' payments of the annuity (*a*).

Specific legacy.

A legacy may be either specific, demonstrative, or general. A specific legacy is a bequest of a specific part of the testator's personal estate. Thus a bequest of "the service of plate, which was presented to me on such an occasion," is specific, and so also is a bequest of "100*l.* consols, now standing in my name at the Bank of England" (*b*), or of "100*l.* consols, part of my stock" (*c*).

Entitled to preference.

A specific legacy must be paid or retained by the executor in preference to those which are general, and must not be sold for the payment of debts until the

ed.; 265, 7th ed.; 276, 8th and 9th eds.; 278, 10th ed.

(*y*) By stat. 35 & 36 Vict c. 44.

(*z*) Stat. 36 Geo. III. c. 52, s. 32; *Ex parte Bennett*, V.-C. K., B., 15 Jur. 213.

(*a*) Stat. 16 & 17 Vict. c. 51, s. 31; 36 Geo. III. c. 52, s. 8.

(*b*) Roper on Legacies, c. 3; *Gordon* v. *Duff*, 28 Beav. 519.

(*c*) *Kirby* v. *Potter*, 4 Ves. 750 a; *Hayes* v. *Hayes*, 1 Keen, 97; *Shuttleworth* v. *Greaves*, 4 M. & Cr. 35.

Ademption.

general assets of the testator are exhausted (*d*). It is, however, liable to *ademption* by the act of the testator in his lifetime. Thus, in the instances given above, if the testator should part with the plate, or sell the stock in his lifetime, the legacy will be adeemed, and the legatee will lose all benefit (*e*).

Demonstrative legacy.

A demonstrative legacy is a gift by will of a certain sum directed to be paid out of a specific fund. Thus, "I bequeath to A. B. the sum of 50*l.* sterling, to be paid out of the sum of 100*l.* consols now standing in my name at the Bank of England," is a demonstrative legacy. Such a legacy is not liable to ademption by the act of the testator in his lifetime; for it is considered to be the testator's intention that the legatee should at all events have the legacy; but that it should, if possible, be paid out of the fund he has pointed out. If therefore the testator in this case should sell the 100*l.* consols in his lifetime, the 50*l.* will still be payable to the legatee out of the general assets (*f*). A demonstrative legacy is accordingly more beneficial to the legatee than a specific legacy. And it is also more beneficial than a legacy which is merely general; for being payable out of a specific fund, it is not, while that fund exists, liable to abatement with the general legacies (*g*).

General legacy.

A general legacy is one payable only out of the general assets of the testator, and is liable to abatement in case of a deficiency of such assets to pay the testator's debts and other legacies. A bequest to A. of 100*l.* sterling is a general legacy; so is a bequest of 100*l.* consols, without referring to any particular stock to which the testator may be entitled (*h*).

(*d*) *Brown* v. *Allen*, 1 Vern. 31; *Hinton* v. *Pinke*, 1 P. Wms. 539; *Sleech* v. *Thorington*, 2 Ves. sen. 560.

(*e*) *Ashburner* v. *M'Guire*, 2 Bro. C. C. 108.

(*f*) *Roberts* v. *Pocock*, 4 Ves. 150; *Attwater* v. *Attwater*, 18 Beav. 330.

(*g*) *Acton* v. *Acton*, 1 Meriv. 178; *Livesay* v. *Redfern*, 2 Y. & C. 90.

(*h*) *Wilson* v. *Brownsmith*, 9 Ves. 180. See, however, *Townsend* v. *Martin*, 7 Hare, 471.

A bequest of a mourning ring, of the value of 10*l.* is also a general legacy, no specific ring of the testator's being referred to (*i*). In the two last cases, the executor would be bound to set apart or buy the stock, or purchase the ring, for the legatee out of the general assets of the testator, supposing them sufficient for the purpose; and should there be a deficiency, the amount of the stock, or the value of the ring to be purchased, would abate proportionably. If, however, any legacy should be given for a valuable consideration, it will not be liable to abatement with the other general legacies. An example of this exception to the usual rule occurs in the case of legacies given by husbands to their wives in consideration of their releasing their dower (*k*). And by the act for the amendment of the law relating to dower (*l*), it is provided (*m*), that nothing therein contained shall interfere with any rule of equity or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

Legacy for valuable consideration.

Dower.

When a legacy is bequeathed by a testator to his creditor, it is considered to be a satisfaction of the debt, if the legacy be equal to or greater than the amount of the debt (*n*). But if it be less than the debt (*o*), or payable at a different time (*p*), or of a different nature from the debt (*q*), or if the debt be contracted subsequently to the date of the will (*r*), or if the will contain

Satisfaction of debts by legacies.

(*i*) 1 Roper on Legacies, c. 3, s. 2.

(*k*) *Burridge* v. *Bradyl*, 1 P. Wms. 127; *Norcott* v. *Gordon*, 14 Sim. 258.

(*l*) Stat. 3 & 4 Will. IV. c. 105.

(*m*) Sect. 12.

(*n*) *Fowler* v. *Fowler*, 3 P. Wms. 353; *Fourdrin* v. *Gowdey*, 3 M. & K. 383, 409; 2 Roper on Legacies, c. 17, s. 1; *Edmonds* v. *Low*, 3 Kay & J. 318.

(*o*) *Graham* v. *Graham*, 1 Ves. sen. 262.

(*p*) *Nicholls* v. *Judson*, 2 Atk. 300; *Hales* v. *Darrell*, 3 Beav. 324.

(*q*) *Alleyn* v. *Alleyn*, 2 Ves. sen. 37; *Bartlett* v. *Gillard*, 3 Russ. 149; *Fourdrin* v. *Gowdey*, 3 M. & K. 383, 409.

(*r*) *Cranmer's case*, 2 Salk. 508.

an express direction for payment of debts and legacies (*s*), the legacy will not be a satisfaction. The leaning of the courts is against the doctrine of the satisfaction of debts by legacies, a doctrine which seems to have been established on rather questionable grounds. When, however, a sum of money is due to a child by way of portion, the inclination of the courts is against double portions; and a legacy to such a child is accordingly regarded as a satisfaction of the portion either in part or in whole, notwithstanding such legacy may be less than the portion, or payable at a different period (*t*). A bequest of the residue, or of a share in the residue, of the testator's estate, will also be considered as a satisfaction pro tanto (*u*). The presumption of satisfaction is indeed so strong, that it is difficult to say what circumstances of variation between the portion and the legacy will be sufficient to entitle the child to both.

Satisfaction of portions.

Statute of Mortmain.

By a statute of George the Second, commonly called the Mortmain Act (*x*), no hereditaments, nor any money, stock in the public funds, or other personal estate whatsoever to be laid out in the purchase of hereditaments, can be conveyed or settled for any charitable uses (with a few exceptions), otherwise than by deed, with certain formalities mentioned in the act (*y*). And all gifts of hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any

(*s*) *Richardson* v. *Greese*, 3 Atk. 65; *Hassell* v. *Hawkins*, 4 Drew. 468.

(*t*) *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; *Weall* v. *Rice*, 2 Russ. & Myl. 251.

(*u*) *Rickman* v. *Morgan*, 2 B. C. C. 394; *Earl of Glengall* v. *Barnard*, 1 Keen, 769; affirmed, 2 H. of L. Cas. 131; *Beckton* v. *Barton*, 27 Beav. 99, 106; *Montefiore* v. *Guedalla*, 1 De Gex, F. & J. 93; *Coventry* v. *Chichester*, 2 H. & Mill. 149; 2 De Gex, J. & S. 336, reversed Law Rep., 2 H. of Lords, 71.

(*x*) Stat. 9 Geo. II. c. 36, s. 1.

(*y*) See Principles of the Law of Real Property, 55, 1st ed.; 58, 2nd ed.; 60, 3rd and 4th eds.; 63, 5th ed.; 65, 6th ed.; 67, 7th ed.; 66, 8th ed.; 67, 9th and 10th eds.

hereditaments, or of any personal estate to be laid out in the purchase of any hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, are rendered void if made in any other form than by the act is directed (*z*). This has been very strictly construed, and has been held to prohibit the bequest for charitable purposes of personal estate in any degree savouring, as it is said, of the realty. Thus, it has been decided that money secured on mortgage of real estate (*a*), shares in a canal navigation (*b*), and leasehold estates (*c*), cannot be left by will for any charitable purpose. But more recently, the strictness of the courts appears to have relaxed; and it has lately been held that money secured by a policy of assurance, although the company may invest their funds in real estates (*d*), and shares in a banking company authorized to invest money on mortgage of real estates (*e*), or in a mining company (*f*), are not within the statute. So it has been held that accrued rents of real estate are unaffected by the act (*g*). And railway scrip (*h*), and shares in gas companies (*i*), docks, railways and canals (*j*), although such shares may not be expressly declared by the acts establishing the under-

Bequest to charities.

(*z*) Stat. 9 Geo. II. c. 36, s. 3.

(*a*) *Attorney-General* v. *Meyrick*, 2 Ves. sen. 44.

(*b*) *Howse* v. *Chapman*, 4 Ves. 542.

(*c*) *Attorney-General* v. *Graves*, Amb. 155.

(*d*) *March* v. *Attorney-General*, 5 Beav. 433.

(*e*) *Ashton* v. *Lord Langdale*, 4 De Gex & Smale, 402; S. C. 15 Jur. 868; *Myers* v. *Perigal*, 2 De Gex, Mac. & Gord. 599.

(*f*) *Hayter* v. *Tucker*, 4 Kay & J. 243. See *Morris* v. *Glynn*, 27 Beav. 218.

(*g*) *Edwards* v. *Hall*, 6 De Gex, M. & G. 74.

(*h*) *Ashton* v. *Lord Langdale*, ubi supra.

(*i*) *Thompson* v. *Thompson*, 1 Coll. 381; *Sparling* v. *Parker*, 9 Beav. 450.

(*j*) *Hilton* v. *Giraud*, 1 De Gex & Smale, 183; *Sparling* v. *Parker*, ubi supra; *Walker* v. *Milne*, 11 Beav. 507; *Ashton* v. *Lord Langdale*, ubi supra; *Edwards* v. *Hall*, 6 De Gex, M. & G. 74; *Linley* v. *Taylor*, 1 Giff. 67; affirmed, 2 De Gex, F. & J. 84.

takings to be personal estate, are now held to be unaffected by the statute. But debentures, by which such undertakings with their rates and tolls are mortgaged, have been held to be within the act (*k*); though such debentures as are mere bonds or covenants to pay money, and not mortgages, are clearly unaffected by it (*l*). With regard to the bequest of money to be laid out in the purchase of hereditaments, it has been decided that a bequest of money to be laid out in building on land already in mortmain is good (*m*); but if some land already in mortmain be not distinctly referred to, a bequest of money for building for any charitable purpose will be void, as implying a direction for the purchase of land on which to build (*n*). And it has also been held that a gift is void which tends directly to bring fresh lands into mortmain, as a gift of money to a charity on condition that other persons provide the land (*o*). This however has been overruled (*p*). And if the purchase of land be not involved in the gift, there is no law which prevents the bequest of purely personal property to any amount for charitable purposes. A bequest to a charity ought, therefore, to be directed to be paid out of such part of the testator's personal estate as he may lawfully bequeath for such a purpose. For if this precaution should be neglected, the charitable legacies will fail in the proportion which the personal assets savouring of the realty may bear to those which are purely personal (*q*).

(*k*) *Ashton* v. *Lord Langdale*, ubi supra; *Re Langham's Trust*, 10 Hare, 446.

(*l*) *Ashton* v. *Lord Langdale*, ubi supra.

(*m*) *Glubb* v. *Attorney-General*, Amb. 373.

(*n*) *Pritchard* v. *Arbouin*, 3 Russ. 456; *Smith* v. *Oliver*, 11 Beav. 481; *In re Watmough's Trusts*, V.-C. M., Law Rep., 8 Eq. 272.

(*o*) *Attorney-General* v. *Davies*, 9 Ves. 535; *Mather* v. *Scott*, 2 Keen, 172; *Trye* v. *Corporation of Gloucester*, 14 Beav. 173.

(*p*) *Philpott* v. *St. George's Hospital*, 6 H. of L. Cas. 338.

(*q*) *Attorney-General* v. *Tyndall*, 2 Eden, 207; S. C., 2 Amb.

Other bequests which require some care are those to illegitimate children. It has been held that a bequest to the future illegitimate children of a particular woman is void as tending to encourage immorality (*r*). And it is clear that a bequest to the future illegitimate children of a particular man is also void, as the courts cannot enter into the inquiry which would be necessary to identify such children (*s*). A child primâ facie means a legitimate child; a bastard is considered by the law as *nullius filius*. Accordingly, an illegitimate child can never take under a gift to children, unless it be clear, upon the terms of the will, or according to the state of facts at the making of it, that legitimate children never could have taken (*t*). An illegitimate child may, however, take under any gift in which he is sufficiently identified as the object of the testator's bounty. Thus, a bequest to the child of which a woman is now pregnant is good (*u*). And if illegitimate children have acquired the reputation of being the children of the testator or any other person, and it appear by necessary implication on the face of the will that such persons were intended in a bequest to children, they will be entitled, not on account of their being children, but on account of their reputation as such (*x*).

Gifts to illegitimate children.

614; *Hobson* v. *Blackburn*, 1 Keen, 273; *Philanthropic Society* v. *Kemp*, 4 Beav. 581; and see *Robinson* v. *Geldard*, 3 Mac. & Gord. 735; *Tempest* v. *Tempest*, 7 De Gex, Mac. & Gord. 470; *Beaumont* v. *Oliveira*, LL.J., Law Rep., 4 Chan. 309.

(*r*) *Medworth* v. *Pope*, 27 Beav. 71. See also 2 Jarm. Wills, 153; 202, 2nd ed.; 204, 3rd ed.

(*s*) *Wilkinson* v. *Adam*, 1 Ves. & Beames, 466.

(*t*) *Cartright* v. *Vawdry*, 5 Ves. 530; *Godfrey* v. *Davis*, 6 Ves. 43; *Harris* v. *Lloyd*, 1 T. & Russ. 310; *Bagley* v. *Mollard*, 1 Russ. & M. 581; *Dorer* v. *Alexander*, 2 Hare, 275; *Re Overhill's Trust*, 1 Sm. & Giff. 362; *Paul* v. *Children*, M. R., Law Rep., 12 Eq. 16.

(*u*) *Gordon* v. *Gordon*, 1 Meriv. 141.

(*x*) *Wilkinson* v. *Adam*, 1 Ves. & B. 422; *Gill* v. *Shelley*, 2 Russ. & My. 336; *Meredith* v. *Farr*, 2 You. & Coll. 525; *Crook* v. *Hill*,

Rights of residuary legatee.

After payment of the testator's debts and legacies, the residue of his personal estate must be paid over to the residuary legatee, if any, named in the will. A will of personal estate has always been considered as speaking from the death of the testator; and it is now expressly enacted, that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (*y*). Hence, it follows that all personal property acquired by the testator between the time of making his will and his decease will pass under it.

Lapse.

If any legacy should lapse by the death of the legatee in the testator's lifetime, or should fail from being contrary to law, it will fall into the residue, and belong to the residuary legatee. And a legacy will lapse by the death of the legatee in the testator's lifetime, although given to the legatee, his executors, administrators and assigns (*z*), for these words are merely inserted in analogy to the limitation of real estate to a man and his heirs.

Joint tenants.

If a bequest be made to two or more as joint tenants, and one of them die in the lifetime of the testator, his share will not lapse, but will survive to the others (*a*).

Tenants in common.

But if the bequest be to two or more in common, and one of them die in the testator's lifetime, his share will lapse (*b*); unless the bequest be made to a class, as to the children of A. in equal shares, in which case all who answer that description at the testator's decease (*c*), and also (if the period of distribution be

Bequest to a class.

LL.J., Law Rep., 6 Ch. Ap. 311; *Lepine* v. *Bean*, M. R., Law Rep., 10 Eq. 160.

(*y*) Stat. 7 Will. IV. & 1 Viet. c. 26, s. 24.

(*z*) *Elliott* v. *Davenport*, 1 P. Wms. 83.

(*a*) *Morley* v. *Bird*, 3 Ves. 628, 631.

(*b*) *Bagwell* v. *Dry*, 1 P. Wms. 700; *Page* v. *Page*, 2 P. Wms. 489; *Barber* v. *Barber*, 3 My. & Craig. 688; *Bain* v. *Lescher*, 11 Sim. 397.

(*c*) *Viner* v. *Francis*, 2 Cox, 190; 2 Jarm. Wills. 74; 126, 2nd ed.; 142, 3rd ed.; *Lee* v. *Pain*, 4 Hare, 250.

postponed by the will) all who come into being before such period (*d*), will be entitled to divide the bequest amongst them. It is, however, provided by the recent act for the amendment of the laws with respect to wills, that where any person, being a child or other issue of the testator, to whom any personal estate shall be bequeathed for any interest not determinable at or before the death of such person, shall die in the testator's lifetime leaving issue, and any such issue shall be living at the death of the testator, such bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*e*). The effect of this provision is curious. If the legatee had died immediately after the testator, leaving a will, it is evident that the estate bequeathed to him would have passed under his will. It has been decided, therefore, that the will of the legatee shall, after his death, operate on the estate bequeathed to him in the same manner as if he had been living (*f*). This provision has been held to apply to a testamentary appointment under a general power of appointment (*g*), but to be inapplicable to a testamentary appointment under a power to appoint amongst the testator's children (*h*); and it does not extend to gifts to children or issue as a class, and not individually (*i*).

Legacies to children.

If there were no residuary legatee, the residue of the testator's personal estate, after payment of debts and legacies, formerly belonged to the executor for his own

Former right of executor to the residue.

(*d*) *Ayton* v. *Ayton*, 1 Cox, 327; 2 Jarm. Wills, 75; 127, 2nd ed.; 143, 3rd ed.

(*e*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 33.

(*f*) *Johnson* v. *Johnson*, 3 Hare, 157. Probate duty attaches; *Perry's executors* v. *The Queen*, Law Rep., 4 Ex. 27.

(*g*) *Eeeles* v. *Cheyne*, 2 Kay & J. 676.

(*h*) *Griffiths* v. *Gale*, 12 Sim. 354; *Freeland* v. *Pearson*, M. R., 36 L. J., N. S., Chan. 374.

(*i*) *Browne* v. *Hammond*, Johnson, 210.

benefit, unless a contrary intention appeared from his being left executor in trust (*k*), or from his having a legacy left him for his trouble (*l*), or from other circumstances (*m*). But by a modern statute (*n*), it is enacted, that when any person shall die, having by will or codicil appointed any executor, such executor shall be deemed by courts of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto (*o*), that the person so appointed executor was intended to take such residue beneficially. The Statute of Distributions is that under which the personal estate of any one dying intestate is distributed between his widow and next of kin. An account of this statute will be found in the next chapter.

Modern statute.

(*k*) *Pring* v. *Pring*, 2 Vern. 99; *Bagwell* v. *Dry*, 1 P. Wms. 700.

(*l*) *Rachfield* v. *Careless*, 2 P. Wms. 158.

(*m*) *Mullen* v. *Bowman*, 1 Coll. 197.

(*n*) Stat. 11 Geo. IV. & 1 Will. IV. c. 40.

(*o*) *Love* v. *Gaze*, 8 Beav. 472.

CHAPTER IV.

OF INTESTACY.

Jurisdiction of ecclesiastical courts over goods of intestate persons.

The ecclesiastical courts until recently had jurisdiction not only over the wills of testators, but also over the goods of persons dying intestate. This jurisdiction, though of long standing, appears to have been at first gradually acquired. In early times the clergy, being possessed of almost all the learning, appear to have been the principal framers of wills. The power they thus acquired was exercised for their own benefit, every man being expected, on making his will, after bequeathing to his lord his heriot, in the next place to remember the church (*a*). If, however, a man should have died intestate, without opportunity of making this provision, the distribution of his goods devolved on the church, together with his friends, the lord first having taken his heriot (*b*). The wife and the children were entitled to their shares; and that part of the goods which the intestate had power to dispose of by his will (called the portion of the deceased) was applied by the church *in pios usus*. This application to pious uses appears to have been as follows: in the first place, the bequest, which it was to be presumed the intestate would have made to the church, was retained, and the residue was then disposed of in paying the debts of the deceased, and distributed amongst his wife and children, his parents and their relatives. That this was the case appears from the complaints which were made by the clergy of those days, of the interference of the tem-

Pious uses.

(*a*) Glanville, lib. 7, c. 5; Bract. 60 a; Fleta, lib. 2, c. 57.

(*b*) Bract. 60 b; Fleta, ubi supra.

poral lords in cases of intestacy, whereby the distribution of the effects in the manner pointed out was prevented (*c*). The clergy themselves, however, do not appear to have been always free from blame; for they are accused of having frequently taken the whole of the intestate's portion to themselves, making no distribution, or at least an undue one, amongst the creditors and relatives of the deceased (*d*); and in order to remedy this evil, it was enacted in the reign of Edward I., by one of the very few statutes then passed relating to personal estate (*e*), that the ordinary should be bound to answer the debts of an intestate, so far as his goods would extend, in the same manner as the executors would have been bounden if he had made a testament. The right of the creditor was thus clothed with a remedy; for, under this statute, an action at law might be brought by the creditor against the ordinary for the payment of his debt (*f*); but the right of the relatives to the surplus still remained undefined.

Administrator.

The duty of administering intestates' effects was not, as may be supposed, usually performed by the bishops in person. For this purpose they usually appointed an administrator; but, as personal property rose in importance, it became desirable that this administrator should not be considered as the mere agent of the bishop, but should himself have a *locus standi*, in the king's courts. It was accordingly enacted by a statute of the reign of Edward III. (*g*), that where a man died intestate the

(*c*) Matthew Paris, 951, Additamenta, 201, 204, 209 (Wats's ed. London, 1640); Constitutions of Boniface, Constitutiones Provinciales, 20, at the end of Lyndewood's Provinciale (Oxon. 1679), recited also in a Constitution of Archbishop Stratford (Lynd. Prov. lib. 3, tit. 13). See Gent. Mag. New Series, vol. ii. 355, 474. See also *Dyke* v. *Walford*, Privy Council, 12 Jurist, 839.

(*d*) Fleta, lib. 2, c. 57.

(*e*) Stat. 13 Edw. I. c. 19.

(*f*) 1 Ro. Abr. 906; Bac. Abr. tit. Executors and Administrators (E).

(*g*) 31 Edw. III. c. 11.

ordinaries should depute the next and most lawful friends of the deceased to administer his goods, which persons so deputed should have action to demand and recover as executors the debts due to the deceased, to administer and dispend for the soul of the dead; and should answer also, in the king's courts, to others to whom the deceased was holden and bound, in the same manner as executors should answer. By a subsequent statute (*h*) administration might be granted to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the ordinary should be thought good. The widow was usually preferred to the next of kin in the grant of administration (*i*); and a joint grant was seldom made, so seldom, indeed, that the powers of co-administrators appear to be still a matter of doubt (*j*). In granting administration to the next of kin, the ecclesiastical courts were guided by the right to the property to be administered (*k*). This right will be hereafter explained. If none of the next of kin would take out administration, a creditor might by custom do so, on the ground that he could not be paid his debt until representation were made to the deceased (*l*); and, for want of creditors, administration might be granted to any person at the discretion of the court (*m*). But the Court of Probate Act, 1857 (*n*), has now abolished the whole of the jurisdiction of the ecclesiastical courts over the effects of intestates; and administration of the effects of deceased persons is now granted by that court in the same manner as the probate of wills (*o*). And after the

Court of Probate Act, 1857.

(*h*) 21 Hen. VIII. c. 5.

(*i*) *Webb* v. *Needham*, 1 Addams, 494.

(*j*) Shep. Touch. 485, 486; Williams on Executors, pt. 3, bk. 1, ch. 2.

(*k*) *In the Goods of Gill*, 1 Hagg. 342.

(*l*) *Webb* v. *Needham*, 1 Addams, 494. See *Coombs* v. *Coombs*, Law Rep., 1 Probate, 288.

(*m*) Williams on Executors, pt. 1, bk. 5, ch. 2, s. 1.

(*n*) Stat. 20 & 21 Vict. c. 77, amended by stat. 21 & 22 Vict. c. 95.

(*o*) *Ante*, p. 345.

decease of any person intestate, his personal estate vests in the judge of the Court of Probate for the time being, until letters of administration are granted, in the same manner and to the same extent as they formerly vested in the ordinary (*p*).

Rights and powers of administrator.

The administrator, when appointed, has the same right to and power over all the personal estate of the intestate as his executors would have had if he had made a will (*q*), and this right and power relate back to the time of the intestate's decease (*r*). The same duty also devolves upon the administrator of paying the debts in the first place. The provisions of the recent statutes for protection of executors in distributing the assets of their testator extend also to the administrator of the effects of an intestate (*s*). He has also the same privilege as an executor of retaining his own debt in preference to all others of the same degree (*t*). But the surplus, after payment of the debts, must be distributed amongst the relatives of the intestate in proportions to be hereafter mentioned. In order to enable the administrator to inform himself of the state of the assets, and to pay the debts of the deceased, the same period of a year from the time of the decease as is allowed to an executor is also given to the administrator before he can be required to make any distribution (*u*). But, notwithstanding this delay, the interest of the persons entitled to the surplus vests in them from the time of

Administrator's year.

(*p*) Stat. 21 & 22 Vict. c. 95, s. 19.

(*q*) Williams on Executors, pt. 2, bk. 1, ch. 1.

(*r*) *Tharpe* v. *Stallwood*, 5 Man. & Gran. 760; *Foster* v. *Bates*, 12 M. & W. 226; *Welchman* v. *Sturgis*, 13 Q. B. 552.

(*s*) Stats. 13 & 14 Vict. c. 35, s. 19; 22 & 23 Vict. c. 35, ss. 27, 28, 29; 23 & 24 Vict. c. 38, s. 14, *ante*, pp. 354, 355; but not stat. 23 & 24 Vict. c. 145, s. 30, *ante*, p. 353.

(*t*) *Warner* v. *Wainsford*, Hob. 127; Williams on Executors, pt. 3, bk. 2, ch. 2, s. 6.

(*u*) Stat. 22 & 23 Car. II. c. 10, s. 8.

the decease of the intestate; so that in case any of them should die within a twelvemonth after the decease of the intestate, the share of the person so dying will pass to his own executors or administrators (*x*).

Limited administration:

In some instances administration is granted for a limited purpose, or confined to a given time. Of this we have already had an instance in the case of administration *durante minore ætate*, when the sole executor named in a will is under age (*y*); and the same sort of administration is granted on intestacy, in case of the minority of the next of kin (*z*). So if the executor or next of kin, as the case may be, should be out of the realm at the time of the decease of the testator or intestate, the court will grant a limited administration *durante absentiâ*, which will expire the moment of the return of such executor or next of kin. And if the executor should prove the will, or if any person should obtain letters of administration, and afterwards go to reside out of the jurisdiction of the English courts, the court is empowered by act of parliament (*a*) to grant administration, at the end of the year from the death of the testator or intestate. Again, when a suit concerning the right of administration is pending in the Court of Probate, that court may appoint an administrator *pendente lite*, who will have all the rights and powers of a general administrator, other than the right of distributing the residue of the personal estate (*b*); and the administrator so appointed may receive such reasonable remuneration for his trouble as the court may think fit (*c*). The court also may appoint such

durante minore ætate;

durante absentiâ;

pendente lite;

(*x*) *Edwards* v. *Freeman*, 2 P. Wms. 442.

(*y*) *Ante*, p. 342.

(*z*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 3.

(*a*) Stat. 38 Geo. III. c. 87, ss. 1—5, extended by stats. 20 & 21 Vict. c. 77, s. 74; 21 & 22 Vict. c. 95, s. 18.

(*b*) Stat. 20 & 21 Vict. c. 77, s. 70.

(*c*) Sect. 72.

cum testamento annexo.

administrator or any other person receiver of the real estate of the deceased pending any suit touching the validity of his will, if it affect such real estate (*d*). So if a will should have been made, but the executors should have renounced, or died before their testator, the court will appoint the person having the greatest interest in the effects, generally the residuary legatee, to administer the same according to the directions of the will, in which case the administration granted is termed an administration *cum testamento annexo,* with the will annexed (*e*). And it is now provided, that, if by reason of the insolvency of the estate of the deceased, or other special circumstances, the court shall think it necessary or convenient to appoint as administrator any other person than the person by law entitled to the grant, the court may do so; and every such administration may be limited as the court shall think fit (*f*).

Stamp duty on administrations.

Letters of administration, as well as probates, are liable to the payment of an *ad valorem* stamp duty on the value of the personal estate of the deceased within the United Kingdom, if it exceed in value the sum of 100*l.* (*g*); but the duty on letters of administration, where there is no will, is after a higher rate than the duty on probates, or on letters of administration with the will annexed (*h*). A heavy penalty is imposed by the Stamp Act on any person who shall take possession of, or in any manner administer, any part of the personal estate of any deceased person, without obtaining

(*d*) Stat. 20 & 21 Vict. c. 77, s. 71.

(*e*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 1.

(*f*) Stat. 20 & 21 Vict. c. 77, s. 73; *In the Goods of Llanwarne,* Law Rep., 1 Probate, 306; *In the Goods of Fraser,* Law Rep., 1 Probate, 327.

(*g*) *Ante,* p. 349.

(*h*) Stat. 55 Geo. III. c. 184.

probate or administration within six calendar months after his or her decease, or within two calendar months after the determination of any suit or dispute respecting the will or the right to administration (*i*). The same exemptions from duty in favour of seamen, marines and soldiers, which have been established with respect to the probate duty (*k*), apply also to the duty on letters of administration.

Exemptions.

The office of administrator is not transmissible, like the office of executor. On the decease of an administrator, before he has distributed all the effects of the intestate, a new administrator must be appointed; for the administrator or executor of such administrator has no right to intermeddle. So if an executor should die intestate, without having completely distributed his testator's effects, an administrator must be appointed to distribute, according to the will of the testator, such of his effects as were not distributed by the deceased executor (*l*). In each of these cases the administration granted is called an administration *de bonis non administratis*, of the goods not administered, or, more shortly, *de bonis non* (*m*). All second and subsequent grants of probate or letters of administration must be made in the principal registry of the Court of Probate, or in the district registry where the will is registered or the original grant of administration has been made, or to which it may have been transmitted (*n*).

Office of administrator is not transmissible.

Administration *de bonis non.*

The application of an intestate's effects, after payment of his debts, is now regulated by statutes of the reign

Statutes of Distribution.

(*i*) 100*l.*, and ten per cent. on the stamp duty. Stat. 55 Geo. III. c. 184, s. 37.

(*k*) *Ante*, pp. 350, 351.

(*l*) Shep. Touch. 465; Williams on Executors, pt. 1, bk. 3, ch. 4.

(*m*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 2.

(*n*) Stat. 21 & 22 Vict. c. 95, s. 20.

of Charles II. and James II. (*o*), commonly called the Statutes of Distribution, by which statutes the rights of the relations of the deceased appear to have been first definitely ascertained and rendered legally available.

Widow's share.

Under these statutes, if the intestate leave a widow and any child or children, or descendant of any child, the widow shall take a third part of the surplus of his effects. If he leave no child, nor descendant of any child, she shall have a moiety. In this respect, the distribution is the same as took place under the ancient law. The husband of a married woman is entitled to the whole of her effects (*p*).

Shares of children:

If the intestate leave children, two-thirds of his effects if he leave a widow, or the whole if he leave no widow, shall be equally divided amongst his children, or, if but one, to such one child.

and their descendants.

But the descendants of such children as may have died in the intestate's lifetime, shall stand in the place of their parent or ancestor (*q*).

Advancements to be accounted for.

Such children, however, as have been advanced by the parent in his lifetime must bring the amount of their advancement into hotchpot, so as to make the estate of all the children to be equal, as nearly as can be estimated. But the heir-at-law, notwithstanding any lands he may have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of such land (*r*).

Father of intestate.

If the intestate leave no children or representatives of them, his father, if living, takes the whole; or, if the intestate should have left a widow, one-half.

Mother, brothers and sisters.

If the father be dead, the mother, brothers, and sisters of the intestate shall take in equal shares (*s*),

(*o*) 22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, s. 7. See Watkins on Descents, Appendix, 257 *et seq.* 4th edit.

(*p*) Stat. 29 Car. II. c. 3, s. 25.

(*q*) See Burton's Compendium, pl. 1402; *Ross's Trusts*, V.-C. W., 20 W. R. 231.

(*r*) Stat. 22 & 23 Car. II. c. 10, s. 5; *Boyd* v. *Boyd*, V.-C. W., Law Rep., 4 Eq. 305.

(*s*) Stat. 1 Jac. II. c. 17, s. 7.

subject, as before, to the widow's right to a moiety; and brothers or sisters of the half blood have an equal claim with those of the whole blood (*t*). If any brother or sister shall have died in the lifetime of the intestate, leaving children, such children shall stand *in loco parentis*, provided the mother or any brother or sister be living (*u*). If there be no brother or sister, nor child of such brother or sister, the mother shall take the whole, or, if the widow be living, a moiety only, as before; but a stepmother can take nothing (*x*). If there be no mother, the brothers and sisters take equally, the children of such as may be dead standing *in loco parentis*. Beyond brothers' and sisters' children, no right of representation belongs to the children of relatives with respect to the shares which their deceased parents would have taken. And if there be neither brother, sister nor mother of the intestate living, his personal estate will be distributed in equal shares amongst those who are next in degree of kindred to him.

Next of kin.

In tracing the degrees of kindred in the distribution of an intestate's personal estate, no preference is given to males over females, nor to the paternal over the maternal line (*y*), nor to the whole over the half blood, as in the case of descent of real estate; nor does the issue stand in the place of the ancestor. The degrees of kindred are reckoned according to the civil law, both upwards to the ancestor and downwards to the issue, each generation counting for a degree (*z*). Thus from

Degrees of kindred traced according to the civil law.

(*t*) *Jessopp* v. *Watson*, 1 My. & K. 665; *Burnet* v. *Mann*, 1 My. & K. 672, n.

(*u*) *Lloyd* v. *Tench*, 2 Ves. sen. 215; *Durant* v. *Prestwood*, 1 Atk. 454; West, 448.

(*x*) *Duke of Rutland* v. *Duchess of Rutland*, 2 P. Wms. 216.

(*y*) *Moor* v. *Barham*, 1 P. Wms. 53.

(*z*) *Mentney* v. *Petty*, Pre. Cha. 593; *Wallis* v. *Hodson*, 2 Atk. 117; 2 Black. Com. 504, 515.

father to son, or from son to father, is one degree; from grandfather to grandson, or from grandson to grandfather, is two degrees; and from brother to brother is also two degrees, namely, one upwards to the father, and one downwards to the other son. So from uncle to nephew is three degrees, one upwards to the common ancestor, and two downwards from him; and from nephew to uncle is also three degrees, two upwards and one downwards. If therefore there be neither issue, father, brother, sister nor mother of the intestate living, such persons as are his next of kin, according to the rule above laid down, are entitled in equal shares *per capita* to his personal estate, subject to his wife's right to a moiety, should she survive him. As the kindred becomes more distant, the number of persons entitled, if living, as well as the difficulty of proving their respective pedigrees, becomes prodigiously augmented. "It is at the first view astonishing," says Blackstone (*a*), "to consider the number of lineal ancestors which every man has within no very great number of degrees: and so many different bloods is a man said to contain in his veins as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and, by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate." The number of collateral relations who may claim through such ancestors is of course far more numerous.

(*a*) 2 Black. Com. 203.

Customs of London and York.

The estates of intestate freemen of the city of London (*b*), and of persons having their fixed or general residence within the archiepiscopal province of York (excepting the diocese of Chester), were until recently distributed according to peculiar customs, apparently derived from the ancient mode of distribution (*c*). Some parts of Wales also appear to have been subject to peculiar customs of distribution; for these several customs, though postponed to the right of testamentary disposition by the statutes to which we have already referred (*d*), were nevertheless not abolished by those statutes in the event of no will being made. But a recent statute has now altogether abolished all customary modes of administration (*e*).

Wales.

Duty on shares of an intestate's estate.

The shares of persons claiming any personal estate of the amount or value of 20*l.* or upwards under an intestacy are subject to the same duty as legacies to persons of the same degree of kindred (*f*). If there be no next of kin, the crown, by virtue of its prerogative, will stand in their place (*g*), but subject always to the widow's right to a moiety in case she should survive (*h*).

The crown.

Place of the half blood.

The division of the personal estate of an intestate, effected by the Statute of Distributions, is remarkable for its fairness. The only provision which might be amended is that which places the half blood on an equality with the whole. A corresponding equality in interest and feeling but rarely exists in actual life.

(*b*) *Onslow* v. *Onslow*, 1 Sim. 18.

(*c*) Williams on Executors, pt. 3, bk. 4, ch. 2.

(*d*) *Ante*, p. 334.

(*e*) Stat. 19 & 20 Vict. c. 94.

(*f*) Stat. 55 Geo. III. c. 184. See *ante*, pp. 355, 356.

(*g*) *Taylor* v. *Haygarth*, 14 Sim. 8; *Powell* v. *Merrett*, 1 Sma. & Giff. 381. See stat. 15 & 16 Vict. c. 3.

(*h*) *Cave* v. *Roberts*, 8 Sim. 214.

The proper place for the half blood appears to be that now assigned to them in the descent of real estate, according to the recommendation of the Real Property Commissioners, namely, next after those of the same degree of the whole blood (*i*). The appointment of an executor or administrator, in whom the whole personal property is vested, with full power of disposition, tends greatly to simplify the title to leasehold estates and other property of a personal nature. It could be wished, however, that the office of an administrator were transmissible in the same manner as that of an executor. In other respects, the distribution of personal estate on intestacy approaches far more nearly to the disposition which the deceased himself would probably have made, than the descent of real property, either at the common law or according to the custom of gavelkind. A person possessed only of small landed property usually devises it to trustees for sale, with full power to give receipts to purchasers, and directs the division of the produce by his trustees amongst his children in such shares as he may think just, with regard to the provision already made for any of them in his lifetime. He does not leave his younger children to beggary in order that his whole property may devolve to his eldest son according to the course of the common law, a course pursued, as the author believes, in no other civilized country in the world (*k*). Neither does he leave it to all his sons equally in undivided shares, thus inflicting an injustice on his daughters, and allowing all plans for the improvement of the lands to be checked by one dissentient voice, unless a partition should be resorted to, by which the property would be split up into parcels too small for the convenience of agriculture. If by any accident a man

Points in which distribution is preferable to descent.

(*i*) See Principles of the Law of Real Property, 77, 1st ed.; 82, 2nd ed.; 86, 3rd and 4th eds.; 91, 5th ed.; 97, 6th ed.; 100, 7th ed.; 103, 8th ed.; 105, 9th ed.; 106, 10th ed.

(*k*) Co. Litt. 191 a, n. (1), vi. 4.

should die without making his will, it would seem to be the province of an equitable legislature to make such a disposition of his property as would, in ordinary circumstances, most nearly correspond with his intention. It is true that when property is large, it is usually entailed on the eldest son and his issue, subject to moderate portions for the younger children. This custom of primogeniture is suited to the institutions of our country, and to the habits of the class to which large landed property usually belongs, and the author has no wish to see it disturbed. The settlements, however, by which these entails are created are more frequently made by deed than by will. They almost invariably contain provisions for the portions of younger children, varying in amount with the value of the property; and, whether made by deed or will, they are usually long and intricate in their nature, providing for the numerous contingencies which may arise under the peculiar circumstances of each family. Nothing in fact can be more different than the devolution of an estate to the eldest son under a family settlement, and the descent on an intestacy to the eldest son as heir at law. In the one case he takes subject to the proper claims of the other members of his family; in the other he is bound to them by no obligation at all. There seems to be no method of making, in case of intestacy, any sort of disposition of landed property which might be reasonably simple, and at the same time resemble an ordinary family settlement. If such a settlement be not made by deed, the owner has ample power of effecting the same object by his will. Intestacy, in fact, rarely happens to the owner of large landed property. The property which descends to heirs under intestacies, though large in the aggregate, is generally small in individual cases. When the wishes of all cannot be consulted, that which would have been the wish of the generality of intestates ought

Primogeniture.

apparently to form the foundation of the rule. From a consideration of these circumstances the reader may perhaps be induced to think, that if, in case of intestacy, the rules for the devolution of real and personal estate were indentical, and with some slight variations similar to those which now exist as to personalty, the law on this subject would be rendered both more simple and more just.

Descent and devolution to distant heirs and kindred.

The descent of real estate to distant heirs, and the devolution of personalty to distant kindred, involve an amount of learning and litigation, the abolition of which would perhaps be desirable. The family and near relations of an intestate have generally claims upon his bounty, which ought not to be disappointed by the accident of his decease without making a will. But distant relatives have seldom any such claims, nor consequently any expectation of such claims being fulfilled. To withhold from them, therefore, that which they had never expected to enjoy, would not be to inflict a loss. Under the present system, the property of an intestate who has no near relations, is not unfrequently frittered away in expensive contests between opposing claimants, or else it devolves unexpectedly upon persons who, for want of previous education, are unable to make use of it with benefit either to themselves or to the community. In a country so heavily burdened as our own, any addition to the public income, not having the pressure of a tax, would be a very desirable acquisition. Such an addition might, as it appears to the author, be very properly made by the devolution to the public of the properties of intestates having none but distant relatives. The country in which a man has lived, and in which his property has been acquired, or at any rate protected, has certainly some claims upon him,—claims which seem preferable to those of the man who, in the case of real estate, founds his title on his descent from the *most*

remote male paternal ancestor of the intestate (*l*), or who claims a share in the personalty because he chances to be a survivor amongst the multitude standing in the fifth or sixth degree of a series of kindred which increases, as it grows distant, in geometrical progression (*m*).

(*l*) See Principles of the Law of Real Property, 78, 1st ed.; 83, 2nd ed.; 87, 3rd and 4th eds.; 92, 5th ed.; 98, 6th ed.; 101, 7th ed.; 104, 8th ed.; 105, 9th ed.; 106, 10th ed.

(*m*) The author's attention has since been called to a similar proposal in Mill's Political Economy, vol. I, pp. 272, 273, 2nd ed.

CHAPTER V.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

Marriage, being essential to the welfare of the community, and also involving important consequences to the individuals concerned, is not on the one hand allowed to be unduly restrained, nor on the other to be brought about by unfair means.

Restraints on marriage.

Amongst the many striking differences between the laws of real and personal property, by which our legal system is complicated, will be found the rules relating to attempted restraints on marriage. Real estate is governed by the rules of the common law; but personal estate, when bequeathed by will, has, as we have seen (*a*), long been subject to the jurisdiction of the ecclesiastical courts. These courts have adopted, with some modification, the rules of the civil law, which is more favourable than the common law of England to liberty of choice in marriage. Hence it follows that some restrictions on marriage, which are valid when applied to a gift of real estate, are void when attempted to be imposed on a gift of personal property. The rules respecting real and personal estate so far agree that a condition annexed to a gift of either, that a person shall not marry at all, is void (*b*). But a gift of either by a husband to his wife during her widowhood is valid (*c*); neither would a gift of the income of property to a

(*a*) *Ante*, p. 346.

(*b*) Shep. Touch. 132; *Perrin* v. *Lyon*, 9 East, 170, 183; *Rishton* v. *Cobb*, 9 Sim. 615; 5 My. & Cr. 145; *Morley* v. *Rennoldson*, 2 Hare, 570.

(*c*) *Barton* v. *Barton*, 2 Vern. 308.

single person until marriage, with a gift over on marriage, appear to be invalid (*d*). When, however, a gift is made, with a condition that it shall be forfeited if the donee marry without the consent of certain trustees or other persons, the difference between the laws of real and personal estate becomes conspicuous. If the gift be of real estate, or of money charged on real estate, it will cease on the event of marriage without the required consent (*e*). But if it be a bequest of personal property, the condition is regarded as merely *in terrorem* and void (*f*), unless accompanied by a bequest over to some other person on the marriage taking place without consent (*g*); so that the legatee will be entitled to retain the legacy, notwithstanding his or her marriage without consent, unless on that event it be expressly given in some other manner. Such conditions in bequests of personalty when unaccompanied by a gift over, are called *in terrorem*, because, says Lord Eldon, "they are supposed to alarm persons, when we know they contain no terror whatsoever" (*h*).

Marriage without consent.

In order to prevent marriages from being unfairly obtained, it is a rule in equity that all contracts for reward for procuring marriages (called marriage brocage) are void (*i*). And if a parent or guardian should stipulate for any private benefit for the marriage of his child or ward, such stipulation would be void, and

Marriage brocage.

(*d*) See *Right* d. *Compton* v. *Compton*, 9 East, 267; *Morley* v. *Rennoldson*, 2 Hare, 570, 580; *Webb* v. *Grace*, 2 Phil. 701; *Lloyd* v. *Lloyd*, 2 Sim., N. S. 255; *Heath* v. *Lewis*, 3 De Gex, M. & G. 954; *Evans* v. *Rosser*, V.-C. W., 10 Jur., N. S. 385; 2 Hem. & Mill. 190.

(*e*) *Reynish* v. *Martin*, 3 Atk. 330, 333.

(*f*) *Bellasis* v. *Ermine*, 1 Cha. Ca. 22.

(*g*) *Stratton* v. *Grymes*, 2 Vern. 357; *Harrey* v. *Aston*, 1 Atk. 361; *Clarke* v. *Parker*, 19 Ves. 1, 13.

(*h*) 19 Ves. 13.

(*i*) *Hall* v. *Potter*, 3 Levinz, 411; Shower's Par. Cas. 76.

money actually paid under it would be decreed to be refunded (*j*).

Marriage settlements.

Few marriages are now contracted between persons possessing any amount of property, without a previous settlement of such property being made, in some stipulated manner, for the benefit of the intended husband and wife and the children of the marriage. As marriage is a valuable consideration (*k*), such settlements are binding on both parties if of full age. And an act of parliament has been passed (*l*) enabling every infant not under twenty if a male, and not under seventeen if a female, to settle his or her property, whether real or personal, upon marriage, provided the sanction of the Court of Chancery be obtained. But if the settlement be not made under the provisions of this act, and either husband or wife should be under age, the settlement will not be binding on him or her (*m*), although the other party, if of full age, will be bound by it (*n*). And if both of them should be under age, neither of them will be bound by it. The circumstance of the settlement of an infant's personal property being fair and reasonable, and made with the approbation of his or her guardians, was formerly considered as giving it validity (*o*); but this circumstance seems now to have no weight. It has, however, been decided that a competent legal jointure (*p*) settled on the intended wife, then

Settlements by infants.

Not binding on party under age.

(*j*) 1 Fonblanque on Equity, 262; *Smith* v. *Bruning*, 2 Vern. 392.

(*k*) *Ante*, p. 79.

(*l*) Stat. 18 & 19 Vict. c. 43; *Re Dalton*, 6 De Gex, M. & G. 201, extended to the Court of Chancery in Ireland, by stat. 23 & 24 Vict. c. 83.

(*m*) *Ellison* v. *Elwin*, 13 Sim. 309; *Le Vasseur* v. *Scratton*, 14 Sim. 116.

(*n*) *Durnford* v. *Lane*, 1 Bro. C. C. 106; *Milner* v. *Lord Harewood*, 18 Ves. 259.

(*o*) 2 Roper's Husband and Wife, 26.

(*p*) See Principles of the Law of Real Property, 174, 1st ed.; 184, 2nd ed.; 191, 3rd ed.; 192,

an infant, with the concurrence of her guardians, in lieu of her right to dower out of her husband's freehold lands, and in lieu of her distributive share of his personal estate in the event of his intestacy, was sufficient to deprive her both of her dower and of her distributive share in her husband's personalty (*q*). When the intended wife only is an infant, a settlement of her personal estate in possession is valid, on account of the interest which, as we shall see, the law gives to the husband in such personal estate. The settlement in such a case is in fact not made by the wife, but by the husband, who, being adult, is bound by its provisions to the extent of the interest which he would have taken had no settlement been made (*r*).

The Married Women's Property Act, 1870 (*s*), though very imperfect, has made some beneficial alterations in the law respecting the property of married women. Down to the time of the passing of this statute, if no settlement were made, the principles which governed the rights of husband and wife to personal property were traceable rather to the circumstances of ancient than of modern times. In ancient times landed property was by far the most important; and the wife was accordingly entitled to a provision out of the lands of her husband, in the event of her surviving him, which no alienation that he could make, nor any debts which he might incur, were able to set aside (*t*). But in those days personal property was of too insignificant a value to be the subject of any such provision. And if a woman now marry without a settlement, she has still no claim

The Married Women's Property Act, 1870.

Ancient rights of husband and wife.

4th ed.; 201, 5th ed.; 211, 6th ed.; 216, 7th ed.; 225, 8th ed.; 226, 9th ed.; 228, 10th ed.

(*q*) *Earl of Buckingham* v. *Drury*, 3 Brown's Par. Cas. 492.

(*r*) *Trollope* v. *Linton*, 1 Sim. & Stu. 477, 487.

(*s*) Stat. 33 & 34 Vict. c. 93.

(*t*) See Principles of the Law of Real Property, 172, 1st ed.; 182, 2nd ed.; 189, 3rd ed.; 190 4th ed.; 199, 5th ed.; 209, 6th ed.; 213, 7th ed.; 223, 8th and 9th eds.; 225, 10th ed.

on her husband's personal estate, however large, unless he should happen to die intestate, in which case, as we have already mentioned, she is entitled to a third or a half of what he may leave, according as he may or may not leave issue surviving him. A husband, on the other hand, was in ancient times considered absolutely entitled to such personal chattels as his wife might possess. In this respect the law was then both simple and sufficient. By the act of marriage, the wife placed herself under the coverture or protection of her husband. She became in the law French of those days a *feme covert*. Thenceforth all demands to which she was personally liable were to be answered by her natural protector. The wife was considered as merged in her husband, and both were regarded as but one person (*u*). So long therefore as the coverture continued, that is, during the joint lives of the husband and wife, the husband was absolutely entitled to all personal property which his wife might acquire, and was also liable to the payment of all debts which she might previously have incurred. Until the passing of the statute above mentioned (*x*), these simple principles pervaded the law relating to the husband's interest in his wife's personal estate; although the several different species of personal estate to which modern civilization has given rise, conjoined with the rules of equitable administration laid down by the Court of Chancery, have given to this branch of law a perplexity unknown to the simple, though somewhat harsh, rules of our ancestors.

The wife's chattels personal belong to her husband.

In the first place, then, personal property of the ancient kind, namely, chattels personal or moveable goods, belonging to the wife at the time of her marriage, or given to her afterwards, become the absolute

(*u*) Pr. R. P. 164, 1st ed.; 176, 2nd ed.; 183, 3rd ed.; 184, 4th ed.; 190, 5th ed.; 200, 6th ed.; 207, 7th ed.; 214, 8th and 9th eds.; 216, 10th ed.

(*x*) Stat. 33 & 34 Vict. c. 93.

property of her husband in the same manner precisely as if they had been originally his own, or had been subsequently given to him (*y*). He may dispose of them as he pleases in his lifetime or by his will; they will be subject to his debts; and if he should die intestate, the wife will have no further claim to them than to any other of his effects. So imperative is this rule, that if chattels personal be given to a married woman jointly with a stranger, the law will instantly sever the jointure, and make the husband and the stranger tenants in common (*z*). The Married Women's Property Act, 1870, has now established an exception to this rule, by providing (*a*) that where any woman, married after the passing of the act (*b*), shall, during her marriage, become entitled to any personal property as next of kin or one of the next of kin of an intestate, such property shall belong to the woman for her separate use.

Exception when wife entitled as next of kin to an intestate.

The only other exceptions to this sweeping rule are the wife's *paraphernalia*, so called from the Greek παραφερνη, being things to which the wife is entitled over and above her dower. The wife's paraphernalia consist of her apparel and ornaments suitable to her rank and degree (*c*); and gifts made by the husband to his wife of jewels or trinkets to be worn by her as ornaments are considered as part of her paraphernalia (*d*). These articles, equally with the wife's other personal chattels, may be disposed of by the husband in his lifetime (*e*),

Paraphernalia.

(*y*) Co. Litt. 300 a; 351 b; Bac. Abr. tit. Baron and Feme (C.) 3; 1 Rop. Husb. and Wife, 169.

(*z*) *Bracebridge* v. *Cook*, Plowden, 411. See *Re Barton's will*, 10 Hare, 12.

(*a*) Stat. 33 & 34 Vict. c. 93, s. 7.

(*b*) The act was passed on the 9th of August, 1870.

(*c*) 2 Bl. Com. 436; 2 Rop. Husb. and Wife, 140; 11 Vin. Abr. tit. Executors (Z. 5).

(*d*) *Graham* v. *Londonderry*, 3 Atk. 394; *Jervoise* v. *Jervoise*, 17 Beav. 566.

(*e*) *Ibid.*; 2 Rop. Husb. and Wife, 141.

and, with the exception of the wife's necessary clothing, are also liable to his debts (*f*). The wife also herself has no power to dispose of them by gift or will during her husband's lifetime (*g*). But paraphernalia differ from the wife's other personal chattels in this respect, that the husband, though he may dispose of them in his lifetime, has no power to bequeath them away from his wife by his will (*h*). Gifts of jewels or trinkets made to the wife by a relative or friend, either upon or after her marriage, will generally be considered in equity as intended for her *separate use* (*i*), in which case they will not be reckoned amongst her paraphernalia, but will, as we shall hereafter see, be exempt from the control and debts of her husband, and may be disposed of by the wife in the same manner as if she were unmarried.

Choses in action.

With regard to such of the wife's personal estate as is not in possession, but for which she has only a right to sue, the rights of the husband are different, according as the proceedings against the persons liable to be sued must be taken in a court of law or of equity. Property of this nature, as we have already seen (*k*), is termed in law French *choses in action:* such as may be recovered by action at law are called legal choses in action, and such as may be recovered by suit in equity are called equitable choses in action. With regard to each of them, the rights of the husband are of a different kind, although in each the same rule applies, that if he can get them into his possession during the coverture he has a right to keep them, otherwise they will belong

Husband may keep them if he can get them during coverture.

(*f*) 2 Bl. Com. 436; *Ridout* v. *Earl of Plymouth*, 2 Atk. 104; *Lord Townsend* v. *Wyndham*, 2 Ves. sen. 1, 7.

(*g*) 2 Rop. Husb. and Wife, 141.

(*h*) *Tipping* v. *Tipping*, 1 P. Wms. 730; *Northey* v. *Northey*, 2 Atk. 77.

(*i*) *Graham* v. *Londonderry*, 3 Atk. 394; 2 Rop. Husb. and Wife, 143; *post*, pp. 399, 400.

(*k*) *Ante*, p. 4.

to his wife (*l*). The following exceptions to this rule have been made by the Married Women's Property Act, 1870 (*m*). The wages and earnings of any married woman, acquired or gained by her after the passing of the act (*n*), in any employment, occupation or trade in which she is engaged, or which she carries on, separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic or scientific skill, and all investments of such wages, earnings, money or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money and property (*o*). Any deposit in a savings bank, and any annuity granted by the commissioners for the reduction of the national debt, in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman (*p*). Any married woman, or any woman about to be married, may have any sum of money in the funds not less than twenty pounds (*q*), or any paid up shares, or any debenture or debenture stock, or any stock of any incorporated or joint-stock company, to the holding of which no liability is attached (*r*), or any share, benefit, debenture, right or claim whatsoever into or upon the funds of any friendly, benefit building or loan society, to the holding whereof no liability is attached (*s*), entered into the books of the bank, or of the company or society, as the case may be, in the name

Exceptions.

Wages and earnings;

gains by literary, artistic or scientific skill.

Deposits in savings banks and annuities;

money in the funds;

shares or stock in companies;

or in friendly, benefit building or loan societies,

may be entered in married

(*l*) 2 Bl. Com. 434; 1 Wms. on Executors, pt. 2, bk. 3, ch. 1, s. 3.
(*m*) Stat. 33 & 34 Vict. c. 93.
(*n*) 9th August, 1870.
(*o*) Sect. 1.
(*p*) Sect. 2.
(*q*) Sect. 3.
(*r*) Sect. 4.
(*s*) Sect. 5.

woman's name to her separate use.

or intended name of the woman as a married woman entitled to her separate use, and the same shall be deemed to be her separate property, and shall be transferred and the dividends and profits paid as if she were an unmarried woman. Where any woman, married after the passing of the act, shall during her marriage become entitled to any sum of money not exceeding two hundred pounds under any deed or will, the same shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to her for her separate use, and her receipts alone shall be a good discharge for the same (*t*). Property to which a woman, married after the passing of the act, becomes entitled as next of kin of an intestate (*u*), and the rents and profits of any freehold, copyhold or customary property, descended upon any such woman as heiress or co-heiress of an intestate (*x*) shall, subject and without prejudice to the trusts of any settlement affecting the same, also belong to her for her separate use in like manner. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property by the act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property; and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security thereof, as if the same belonged to her as an unmarried woman (*y*). The provisions in the act as to policies of life assurance have already been mentioned (*z*).

Money not exceeding 200*l.* under deed or will.

Property coming to married woman as next of kin or heiress.

Married woman may maintain an action in her own name.

Life assurance.

Legal choses in action.

Legal choses in action consist principally of debts

(*t*) 33 & 34 Vict. c. 93, s. 7.
(*u*) *Ibid.*, *ante*, pp. 374, 375.
(*x*) Sect. 8.
(*y*) Sect. 11.
(*z*) *Ante*, p. 187.

due to the wife, and secured or not by bond, or by bills or promissory notes. Of all these the husband has a right to receive payment, and should payment be refused him, he may sue for them in the joint names of himself and his wife (*a*); but bills and notes of the wife payable to order, being transferable by indorsement, may be indorsed by the husband alone (*b*), or sued for in his own name (*c*). All such legal choses in action as accrued to the wife *after* her marriage may be sued for by the husband, either in the joint names of himself and his wife, or in his own name only (*d*); but if the wife has really no interest, he cannot of course make use of her name (*e*). If the husband should sue in the joint names of himself and his wife, the benefit of the judgment of the court will in case of his decease survive to her (*f*); but if he sue in his own name, the benefit of the judgment will form part of his own personalty. If, however, the husband should not have received the money in his lifetime, or should not have obtained judgment for it in his own name, his wife will, on his decease, be entitled by survivorship to the chose in action so remaining still unreduced into possession (*g*); and bills and notes form no exception to this rule (*h*). But, if the wife should die before her husband, these choses in action, still remaining unreduced, will form part of her personal estate; and her husband must take out administration to her effects before he can

Husband surviving must take out administration.

(*a*) 1 Rop. Husb. and Wife, 213, 214; *Sherrington* v. *Yates*, 12 Mee. & Wels. 855. In this case the note was not payable to order, and therefore not negotiable.

(*b*) *Mason* v. *Morgan*, 2 Ad. & El. 30.

(*c*) *Burrough* v. *Moss*, 10 Barn. & Cress. 558.

(*d*) 1 Rop. Husb. and Wife, 213.

(*e*) *Abbot* v. *Blofield*, Cro. Jac. 644.

(*f*) 1 Vern. 396; 1 Rop. Husb. and Wife, 212.

(*g*) Co. Lit. 351 b.

(*h*) *Richards* v. *Richards*, 2 Barn. & Adol. 447; *Gaters* v. *Madeley*, 6 Mee. & Wels. 423; *Hart* v. *Stephens*, 6 Q. B. 937; *Scarpellini* v. *Atcheson*, 7 Q. B. 864.

proceed to recover them (*i*): when recovered, they will, with the rest of her personalty, belong to himself absolutely, after payment of her debts (*k*). The only exception to this rule occurs in the case of the husband being entitled, in right of his wife, to "any estate in fee simple, fee tail, or for term of life of or in any rents or fee-farms;" in which case the husband, after the death of his wife, is empowered by statute (*l*) to recover the arrears accrued to his wife before marriage by action of debt or distress. But this provision does not apply to the rents reserved upon leases for years (*m*).

Exception.

Equitable choses in action.

Equitable choses in action consist principally of legacies, residuary personal estate of testators, and money in the funds. But all kinds of property, including, as is now decided, both freehold estates (*n*) and chattels real (*o*), vested in trustees, who are answerable only to the Court of Chancery, are subject to a rule of equity, by which equitable choses in action are mainly distinguished from such as are merely legal. This rule is as follows: that the Court of Chancery will not assist, nor, if the wife should dissent, will it allow, the husband to recover or receive any property of his wife recoverable only in that court, without his settling a due proportion of such property on his wife and children (*p*). The right of the wife to such a provision is termed *the*

Wife's equity for a settlement.

(*i*) 1 Rop. Husb. and Wife, 205. See *Betts* v. *Kimpton*, 2 B. & Adol. 273.

(*k*) Stat. 29 Car. II. c. 3, s. 25, *ante*, p. 374.

(*l*) Stat. 32 Hen. VIII. c. 37, s. 3.

(*m*) *Prescott* v. *Boucher*, 3 Barn. & Adol. 849.

(*n*) *Sturgis* v. *Champneys*, 5 Myl. & Cr. 97; *Wortham* v. *Pemberton*, 1 De Gex & S. 644; *Gleaves* v. *Paine*, 1 De Gex, J. & S. 87. See, however, Sugd. V. & P. 450, 13th ed.; 560, 14th ed.

(*o*) *Hanson* v. *Keating*, 4 Hare, 1.

(*p*) It was formerly held that the wife's equity to a settlement did not extend to sums under 200*l*.; *Foden* v. *Finney*, 4 Russ. 428; but this distinction is now abolished; *In re Cutler*, 14 Beav. 220; *Re Kincaid*, 1 Drew. 326.

wife's equity for a settlement (*q*). In fixing the proportion to be settled, a prior settlement will always be taken into account (*r*). But where no settlement has previously been made, the proportion required to be settled on the wife is most frequently one-half (*s*); and sometimes the court has gone so far as to require a settlement of the whole fund (*t*). Although the children are usually inserted in the settlement, yet the right is personal to the wife, and may be waived by her (*u*); nor will it survive to the children in case of her decease before the court has made its decree (*x*); but if she die after the decree, it will still be carried into effect for the benefit of the children (*y*). The ultimate limitation in default of children is in favour of the husband absolutely; as, but for the equity to a settlement, the property would have been his own (*z*). This rule of the Court of Chancery, by which a settlement is enforced, is founded on one of the maxims of equity, that he who would have equity must do what is equitable (*a*); it cannot, therefore, be enforced until the time arrives

(*q*) 1 Rop. Husb. & Wife, 256 *et seq.*

(*r*) *March* v. *Head*, 3 Atk. 720; *Lady Elibank* v. *Montolieu*, 5 Ves. 737; *Erskine's Trust*, 1 Kay & John. 302; *Spirett* v. *Willows*, L. C., 12 Jur., N. S. 538; 1 Law Rep., Ch. Ap. 520.

(*s*) 1 Rop. Husb. and Wife, 260; *Archer* v. *Gardiner*, 1 C. P. Coop. 340.

(*t*) *Brett* v. *Greenwell*, 3 You. & Coll. 230; *Gardner* v. *Marshall*, 14 Sim. 575; *Scott* v. *Spashett*, 3 Mac. & Gord. 599; *Dunkley* v. *Dunkley*, L. C., 16 Jur. 767; 2 De Gex, M. & G. 390; *Marshall* v. *Fowler*, 16 Beav. 249; *Gent* v. *Harris*, 10 Hare, 383; *Re Welchman*, 1 Giff. 31.

(*u*) *Murray* v. *Lord Elibank*, 13 Ves. 6. But the wife having once insisted on her right cannot afterwards waive it; *Barker* v. *Lea*, 6 Mad. 330; *Whittem* v. *Sawyer*, 1 Beav. 593.

(*x*) *De la Garde* v. *Lempriere*, 6 Beav. 344; overruling *Steinmitz* v. *Halthin*, 1 Glyn & Jam. 64; *Baker* v. *Bayldon*, 8 Hare, 210; *Wallace* v. *Auldjo*, V.-C. K., 9 Jur., N. S. 687; 2 Drew. & Smale, 216, affirmed by Lords Jus., 11 W. R. 972; 1 De Gex, J. & S. 643.

(*y*) *Groves* v. *Clarke*, 1 Keen, 132; S. C., *Groves* v. *Perkins*, 6 Sim. 584.

(*z*) *Croxton* v. *May*, Law Rep., 9 Eq. 404; *Walsh* v. *Wason*, L. C. & L. J. M., 21 W. R. 554.

(*a*) 2 P. Wms. 641.

when the fund becomes payable to the husband (*b*). If, however, as most frequently happens, the husband can obtain from the executor or trustee of the fund in question payment of it to himself, without the assistance of the court, he has a right to do so, and in this case the wife's equity is at once excluded; and if the time of payment has arrived the executor or trustee may safely pay over the fund to the husband, unless the wife shall have already filed her bill in Chancery to enforce her right to a settlement (*c*); and the receipt of the fund by the husband, when it has thus become payable, is also an effectual bar to the wife's right by survivorship (*d*).

Effect of the husband's assignment.

If the husband, instead of obtaining payment of the fund, should assign it to a third person (*e*), or if he should become bankrupt (*f*), his assignee or the trustee for his creditors will take subject to the wife's equity for a settlement, in the same manner as if no assignment had been made. But if the interest to which the wife is entitled consists of an equitable estate for her life only, an assignee from the husband of such life interest for valuable consideration will be entitled to hold it as against the wife's equity for a settlement (*g*); although she would be entitled to a settlement as against his assignees, or now his creditors' trustee, in bankruptcy (*h*). If the husband should die before the

(*b*) *Osborn* v. *Morgan*, 9 Hare, 432.

(*c*) 1 Rop. Husb. and Wife, 273; *Murray* v. *Lord Elibank*, 10 Ves. 90.

(*d*) 1 Rop. Husb. and Wife, 220; *Rees* v. *Keith*, 11 Sim. 388; *Cunningham* v. *Antrobus*, 16 Sim. 436.

(*e*) 1 Rop. Husb. and Wife, 271; *Malcolm* v. *Charlesworth*, 1 Keen, 73, 74; *Scott* v. *Spashett*, 3 Mac. & Gord. 599; *Carter* v. *Taggart*, 5 De Gex & Smale, 49; 1 De Gex, M. & G. 286. See *Ward* v. *Yates*, 1 Drew. & S. 80.

(*f*) 1 Rop. Husb. and Wife, 268.

(*g*) *Elliott* v. *Cordell*, 5 Mad. 149; *Stanton* v. *Hall*, 2 Russ. & M. 175, 182; *Tidd* v. *Lister*, 10 Hare, 140, 154; 3 De Gex, M. & G. 857; *Re Duffy's Trust*, 28 Beav. 386.

(*h*) *Wright* v. *Morley*, 11 Ves. 17.

assignee has got possession of the fund, leaving his wife surviving, the wife's right by survivorship will prevail over the title of the creditors' trustee in bankruptcy (*i*) or the assignee for valuable consideration (*k*).

Disposition of wife's reversionary interests.

An act of parliament of the present reign (*l*) enables every married woman, with the concurrence of her husband, by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate to which she shall be entitled under any instrument (except her marriage settlement) *made after the* 31*st December*, 1857; also to release or extinguish any power in regard to any such personal estate; and also to release and extinguish her equity to a settlement out of her personal estate in possession under any such instrument as aforesaid. But every such disposition must be separately acknowledged by her in the manner required by the act for the abolition of fines and recoveries (*m*). And nothing therein contained is to extend to any reversionary interest, to which she shall become entitled under any instrument by which she shall be restrained from alienating or affecting the same.

Release of powers.

Release of equity to a settlement.

To be separately acknowledged.

Assignment of wife's reversionary choses in action.

If the wife should be entitled to any chose in action, whether legal or equitable, of a reversionary nature, not within the above-mentioned act, the effect of an assignment by the husband will be different under different circumstances. The wife, of course, cannot assign; for

(*i*) *Pierce* v. *Thornley*, 2 Sim. 167.

(*k*) *Hutchings* v. *Smith*, 9 Sim. 137; *Ellison* v. *Elwin*, 13 Sim. 309; *Ashby* v. *Ashby*, 1 Coll. 553; *Le Vasseur* v. *Scratton*, 14 Sim. 116; *Michelmore* v. *Mudge* 2 Giff. 183.

(*l*) Stat. 20 & 21 Vict. c. 57.

(*m*) Stat. 3 & 4 Will. IV. c. 74. See Principles of the Law of Real Property, 189, 4th ed.; 197, 5th ed.; 207, 6th ed.; 212, 7th ed.; 222, 8th and 9th eds.; 224, 10th ed.

Example.

by the act of marriage she deprives herself of all power so to do; and the husband can only assign to another the interest to which he may be entitled himself. Suppose therefore that the wife is entitled, on the death of A., a person now living, to a sum of stock standing in the names of trustees, and that her husband should make an assignment of this reversionary interest to B., a purchaser; the benefit which will accrue to B. by virtue of this assignment will vary, according as the husband, the wife, or A., the tenant for life, may happen to die first. If the husband should die first, B. will lose his purchase; for the wife, having survived her husband, will now on the death of A. be entitled to the stock, which has never been reduced into the possession of her husband, or of B., his assignee (*n*). If A. should die first, B. may then obtain a transfer of the stock, if the trustees choose to transfer it to him, and if the wife should not have filed a bill to enforce her equity to a settlement (*o*). But if the trustees should refuse to transfer without the direction of the Court of Chancery, or if the wife should insist upon her right, then B. will, as we have seen (*p*), most probably obtain only half of the fund for his own benefit, and will be obliged to settle the other half on the wife and children. If, however, the wife should die first, then this chose in action, remaining unreduced into possession, will, like a legal chose in action, under the same circumstances (*q*), remain part of the wife's personal estate; and the husband, on taking out administration to his wife, will be bound by his previous assignment. B. will accordingly in this single event obtain the whole fund, subject however to the wife's debts, if any. It was once thought that if an assignment could be obtained from the tenant for life,

(*n*) *Purdew* v. *Jackson*, 1 Russ. 1; *Honner* v. *Morton*, 3 Russ. 65.

(*o*) *Greedy* v. *Lavender*, 13 Beav. 62.

(*p*) *Ante*, p. 393.

(*q*) *Ante*, p. 391.

of his life interest in a fund circumstanced as above mentioned, to the married woman entitled to the reversion, she would be in the same situation as if the whole fund had been originally held in trust for her absolutely; and that after such an assignment, the whole fund might therefore be transferred to the husband (*r*). But it is contrary to the general principle of equity to allow the rights of parties to be affected by any merger or extinguishment of interests; and the doctrine in question has been overruled (*s*).

Release of husband.

The same principles which apply to the assignment by a husband of his wife's reversionary interest in a chose in action, apply also to his release, which will be as little binding on her as his assignment, in case of her being the survivor (*t*). If, however, the reversionary chose in action of the wife consist of money charged on real estate, the wife's interest can either be released or assigned by a deed acknowledged by her, with the concurrence of her husband, under the provisions of the act for the abolition of fines and recoveries (*u*). The contrary was decided in a case (*x*), which may now be considered as overruled (*y*).

Money charged on real estate.

Husband's liability to his wife's debts.

The same principle of the merger of the wife in the husband, which gives him such important rights in her

(*r*) *Creed* v. *Perry*, 14 Sim. 592; *Hall* v. *Hugonin*, 14 Sim. 595; *Bishopp* v. *Colebrook*, V.-C. E., 11 Jur. 793.

(*s*) *Whittle* v. *Henning*, 11 Beav. 222; affirmed, 2 Phil. 731; *Hanchett* v. *Briscoe*, 22 Beav. 496.

(*t*) *Rogers* v. *Acaster*, 14 Beav. 445; *Harley* v. *Harley*, 10 Hare, 325.

(*u*) Stat. 3 & 4 Will. IV. c. 74. See Principles of the Law of Real Property, 189, 4th ed.; 197, 5th ed.; 207, 6th ed.; 212, 7th ed.; 222, 8th and 9th eds.; 224, 10th ed.

(*x*) *Hobby* v. *Allen*, V.-C. Knight Bruce, 15 Jur. 835; S. C., nom. *Hobby* v. *Collins*, 4 De Gex & S. 289.

(*y*) Sugd. Real Property Statutes, p. 240, 1st ed.; p. 233, 2nd ed.; *Briggs* v. *Chamberlain*, V.-C. Wood, 18 Jur. 56; S. C., 11 Hare, 69; *Tuer* v. *Turner*, 20 Beav. 560.

personal estate, renders him also answerable for all the debts and liabilities of his wife contracted previously to her marriage (*z*). But if judgment for any debt be not recovered during the continuance of the marriage, the liability ceases, except to the extent of the assets to which the husband may be entitled as his wife's administrator (*a*); and if the wife survive, she will again become solely liable. But the Married Women's Property Act, 1870 (*b*), now provides (*c*) that a husband shall not, by reason of any marriage which shall take place after that act (*d*), be liable for the debts of his wife contracted before marriage; but the wife shall be liable to be sued for, and any property belonging to her for her separate use (*e*) shall be liable to satisfy, such debts as if she had continued unmarried. The husband is bound during the coverture to supply his wife with necessaries suitable to her station in life. She is therefore, whilst living with him, considered as his agent for the purchase of any such necessary articles with which he may not have supplied her (*f*). And even if the articles should not be necessaries, yet if the husband be aware of the purchase (*g*), or if he recognize it, by allowing his wife to use or wear the articles bought (*h*), she will be considered as having bought them with his authority, and he will consequently be liable to pay for them. On the other hand the wife, having separate property, is now liable to an order of justices for the maintenance of her husband if he has become charge-

Exception as to marriages after 9th Aug. 1870.

Wife's necessaries.

Wife's liability to maintain her husband;

(*z*) 2 Roper's Husband and Wife, 73; *Palmer* v. *Wakefield*, 3 Beav. 227; *Luard's case*, 1 De Gex, F. & J. 533.

(*a*) *Heard* v. *Stamford*, 3 P. Wms. 409.

(*b*) Stat. 33 & 34 Vict. c. 93.

(*c*) Sect. 12.

(*d*) 9th August, 1870.

(*e*) Whether with or without power of anticipation; *Sanger* v. *Sanger*, Law Rep., 11 Eq. 470.

(*f*) 2 Roper's Husband and Wife, 110; *Seaton* v. *Benedict*, 5 Bing. 28.

(*g*) *Petty* v. *Anderson*, 3 Bing. 170.

(*h*) See *Montague* v. *Benedict*, 3 Barn. & Cress. 631, 638.

able to any union or parish (*i*). She is also under the same liability as a widow for the maintenance of her children (*j*). and children.

The burdens with which the husband is thus chargeable are the consideration which he pays for his marital rights in his wife's property. It is therefore a rule of law, that the husband shall not, previously to the marriage, be defrauded of those rights by his intended wife (*k*). Accordingly if the wife, after an engagement to marry, should assign away any of her property without the knowledge and consent of her intended husband, such assignment would be void, as a fraud on his marital rights (*l*). And the circumstance of the intended husband's being ignorant of her possession of the property in question would be immaterial (*m*). Fraud on the husband's marital rights.

The right of the husband to the whole of his wife's personal estate, in the event of her decease in his lifetime, may be waived by his giving her authority to dispose of such estate, or any part of it, by her will; and such a will will be valid and binding on the husband if he once allow it to be proved (*n*). But during the wife's lifetime, and even after her death, until probate of the will, this authority may be revoked; and if the husband should die before the wife, such a will would not be binding on the wife's next of kin (*o*). The husband may authorize his wife to dispose of her personal estate by her will.

But at the present day, power to dispose of property of any kind may be given to a married woman, inde- Trusts for the wife's separate use.

(*i*) Stat. 33 & 34 Vict. c. 93, s. 13.

(*j*) Sect. 14.

(*k*) *Countess of Strathmore* v. *Bowes*, 1 Ves. jun. 22, 28.

(*l*) *England* v. *Downs*, 2 Beav. 522; *Taylor* v. *Pugh*, 1 Hare, 608; *Prideaux* v. *Lonsdale*, 4 Giff. 159; affirmed, 1 De Gex, Jones & Smith, 433; *Downes* v. *Jennings*, 32 Beav. 290.

(*m*) *Goddard* v. *Snow*, 1 Russ. 485.

(*n*) 1 Rop. Husb. and Wife, 169, 170.

(*o*) 15 Ves. 156.

pendently of her husband, by means of a trust for her *separate use*, which trust may be enforced in equity (*p*). When personal estate is so given, the wife has the same powers of ownership as if she were a feme sole; she may accordingly dispose of such property without her husband's concurrence, either in her lifetime or by her will (*q*). But should she die in his lifetime without having made any disposition, her husband will become entitled to it either in his marital right (*r*) or as her administrator (*s*), according as the property may be in possession or in action. A trust for a woman's *separate use* is properly and technically created by means of the words "separate use." But a direction that her receipt alone shall be a sufficient discharge (*t*), will also create a trust for her separate use. A gift, however, to a woman for her sole use has now been decided not to create a trust for her separate use, unless aided by the context (*u*). And a gift to a woman for her own use (*x*), or to be paid into her proper hands (*y*), or even to be paid into her proper hands for her own proper use and benefit (*z*), will not be sufficient to exclude the rights of her husband.

Gifts of income for a woman's separate use.

A simple gift of property for a married woman's separate use is not so usual as the gift of the income only

(*p*) See Principles of the Law of Real Property, 164, 1st ed.; 174, 2nd ed.; 181, 3rd ed.; 182, 4th ed.; 190, 5th ed.; 200, 6th ed.; 207, 7th ed.; 214, 8th and 9th eds.; 216, 10th ed.

(*q*) *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; S. C., 3 Bro. C. C. 8; 2 Rop. Husb. and Wife, 182.

(*r*) *Molony* v. *Kennedy*, 10 Sim. 174; *Tugman* v. *Hopkins*, 4 Man. & Gran. 384.

(*s*) *Watt* v. *Watt*, 3 Ves. 246, 247; *Proudley* v. *Fielder*, 2 My. & Keen, 57.

(*t*) *Lee* v. *Prieaux*, 3 Bro. C. C. 381.

(*u*) *Massy* v. *Hayes*, L. J., Ireland, 15 W. R. 376; affirmed in the House of Lords, 16 July, 1869, Law Rep., 4 H. of L. 288; *Gilbert* v. *Lewis*, 1 De Gex, J. & S. 38.

(*x*) *Roberts* v. *Spicer*, 5 Madd. 491; *Kensington* v. *Dollond*, 2 Myl. & Keen, 184.

(*y*) *Tyler* v. *Lake*, 2 Russ. & Myl. 183.

(*z*) *Blacklow* v. *Laws*, 2 Hare, 49.

of the property during her life or during the joint lives of herself and her husband (*a*). A gift of the income of property to a woman's separate use may be made either after her marriage, or in contemplation of marriage, or whilst she is sole; and the gift may be made either independently of her present husband, if any, or of any future husband. When the gift is made to a woman's separate use, independently of any future husband, the act of her marriage will confer no interest in the property on her husband, but she will enjoy, after marriage, the same interest and power of disposition as she had before (*b*). It is, however, more usual, when the income only of property is given to a wife's separate use, to insert a condition that she shall not dispose of the same in any mode of anticipation. Conditions restraining the alienation of property are generally invalid, as being contrary to the policy of the law. But the courts of equity have made an exception to this rule in favour of married women, and having once established a trust for a woman's separate use, they have permitted such a trust to be made effectual by depriving the wife herself of the power of disposition (*c*). When the income of property is given to a woman's separate use, without power of anticipation, she is not thereby deprived of the power of alienation so long as she continues single (*d*). Previously to or in contemplation of marriage she may therefore make such disposition or settlement of such income as she may think proper. But should she marry without a settlement, the restraint on alienation will then attach, and so long as she remains under coverture she will have no further power than that of receiving

Restraint on anticipation.

(*a*) See Appendix B.

(*b*) *Tullett* v. *Armstrong*, 1 Beav. 1; 4 Myl. & Cr. 390; *Scarborough* v. *Borman*, 1 Beav. 34; 4 Myl. & Cr. 377.

(*c*) *Brandon* v. *Robinson*, 18 Ves. 434; *Robinson* v. *Wheelwright*, 6 De Gex, M. & G. 535.

(*d*) *Woodmeston* v. *Walker*, 2 Russ. & Myl. 197; *Brown* v. *Pocock*, 2 Russ. & Myl. 210.

the income as it grows due (*e*). On her widowhood her power of alienation will again revive (*f*), but will cease on her second marriage without having previously made any disposition (*g*), provided the restriction on alienation be not, by the terms of the gift, confined to her first marriage (*h*). The intention to restrain alienation ought always to be clearly expressed. A direction to pay the income of property into the hands of a married woman, and not otherwise (*i*), or on her personal appearance and receipt (*k*), will not be sufficient to restrain her from disposing of her interest, the words being considered as intended only to exclude the marital claims of her husband. But if an intention can be collected from the terms of the instrument, not only to exclude the husband's claims, but also to prevent the wife from anticipating, such intention will prevail, although it may be expressed rather in popular than in strictly technical language (*l*).

Powers.

In addition to trusts for separate use, powers of appointment may, as we have seen (*m*), be given to married women independently of their husbands, by means of which they may be enabled to dispose of property without their husband's concurrence (*n*); and any appointment under a general power may be made by a married

(*e*) *Tullett* v. *Armstrong*, 1 Beav. 1; 4 Myl. & Cr. 390; *Scarborough* v. *Borman*, 1 Beav. 34; 4 Myl. & Cr. 377; *Clive* v. *Carew*, 1 John. & H. 199.

(*f*) *Barton* v. *Briscoe*, Jacob, 603.

(*g*) *Tullett* v. *Armstrong*, ubi supra; *Re Guffee*, 1 Mac. & Gor. 541; *Hawkes* v. *Hubback*, M. R., 19 W. R. 117; Law Rep., 11 Eq. 5.

(*h*) *Moore* v. *Morris*, 4 Drew. 33.

(*i*) *Acton* v. *White*, 1 Sim. & Stu. 429.

(*k*) *Ross's Trust*, 1 Sim., N. S. 196.

(*l*) *Brown* v. *Bamford*, 1 Phil. 620; *Moore* v. *Moore*, 1 Coll. 54; *Harrop* v. *Howard*, 3 Hare, 624; *Harnett* v. *Macdougall*, 8 Beav. 187; *Field* v. *Evans*, 15 Sim. 375; *Baker* v. *Bradley*, 7 De Gex, M. & G. 597; *Goulder* v. *Camm*, 1 De Gex, F. & J. 146.

(*m*) *Ante*, p. 283.

(*n*) See Appendix B.

woman in favour of her husband, as well as of any other person.

Separation.

Unhappy differences between husband and wife sometimes end in a separation. Such a state of things is not, however, encouraged by the law. A clause in a marriage settlement providing for the event of a separation, has been considered to be void (*o*); and so has a condition in a gift of personal estate to a woman living apart from her husband, that the gift shall cease in case she should cohabit with him (*p*). It is however clear, that a deed making provision for an immediate separation between husband and wife is not void for illegality (*q*), and any infringement of the covenants contained in it will be restrained by the injunction of the Court of Chancery (*r*). One of the usual provisions of a deed of separation is, a covenant on the part of some friend of the wife's to indemnify the husband against any debts she may incur whilst living apart. Such a covenant is a valuable consideration for any settlement which the husband may make for the benefit of his wife, and places such settlement on the same footing as any other alienation made for valuable consideration (*s*). But if there be no such covenant, nor any other valuable consideration (*t*), a settlement made by a husband on separating from his wife stands in the same position as any other voluntary deed (*u*); and, though binding on himself, may not be

Covenant to indemnify against wife's debts.

(*o*) *Cocksedge* v. *Cocksedge*, 14 Sim. 244; *Cartwright* v. *Cartwright*, 3 De Gex, M. & G. 982; *H.* v. *W.*, 3 Kay & J. 382. See also *Hindley* v. *Marquis of Westmeath*, 6 Barn. & Cress. 200; *Merryweather* v. *Jones*, 4 Giff. 499.

(*p*) *Wren* v. *Bradley*, 2 De Gex & S. 49.

(*q*) *Jones* v. *Waite*, 4 Man. & Gr. 1104.

(*r*) *Sanders* v. *Rodway*, 16 Beav. 207; *Hamilton* v. *Hector*, Law Rep., 13 Eq. 511.

(*s*) *Stephens* v. *Olive*, 2 Bro. C. C. 90; *Worrall* v. *Jacob*, 3 Meriv. 256, 269.

(*t*) See *Wilson* v. *Wilson*, 14 Sim. 405; 1 H. of L. Cas. 538.

(*u*) See *ante*, pp. 311—313.

binding on his creditors (*x*). The circumstance of voluntary separation gives to the wife no further power of disposition over property than she possessed whilst living with her husband (*y*). Accordingly she will not, should she survive her husband, be bound by any disposition of her personal estate made on the separation, which her husband would have been unable to make, without her concurrence, had no separation taken place (*z*). If after separation the parties become reconciled (*a*), or if a restitution of conjugal rights be decreed by the Court for Divorce and Matrimonial Causes (*b*), the provisions of the deed of separation will thenceforth become inoperative.

Custody of infant children.

In the event of separation, the custody of the infant children belongs by law to the father as the natural guardian (*c*). And it was formerly decided that he was incompetent to relinquish a duty thrown upon him by the law, and that, therefore, a covenant on his part to give up the children to the care of their mother was illegal (*d*). If, however, the conduct of the father should be such that the children would be exposed to cruelty or gross corruption of morals from being left in his custody, the law would have deprived him of a charge

(*x*) *Fitzer* v. *Fitzer*, 2 Atk. 511; *Clough* v. *Lambert*, 10 Sim. 174.

(*y*) *Lord St. John* v. *Lady St. John*, 11 Ves. 531.

(*z*) *Stamper* v. *Barker*, 5 Madd. 157; *Slatter* v. *Slatter*, 1 Yo. & Col. 28.

(*a*) *Bateman* v. *Ross*, 1 Dow, 235, 245; *Lord St. John* v. *Lady St. John*, 11 Ves. 537; *Wilson* v. *Wilson*, 15 Sim. 487, 500; 1 H. of L. Cas. 538. See, however, *Hulme* v. *Chitty*, 9 Beav. 437.

(*b*) *Fletcher* v. *Fletcher*, 2 Cox, 99; stat. 20 & 21 Vict. c. 85.

(*c*) Co. Litt. 88 b, n. (12); *Rex* v. *Sherrington*, 3 Barn. & Adol. 714.

(*d*) *Lord St. John* v. *Lady St. John*, 11 Ves. 531; *Vansittart* v. *Vansittart*, 4 Kay & J. 62; 2 De Gex & Jones, 249; *Hope* v. *Hope*, 22 Beav. 351; 3 Jur., N. S. 454, Lords Just.; *Walrond* v. *Walrond*, 1 John. 18; *Andrews* v. *Salt*, LL.J., 21 W. R. 616.

for which he had shown himself totally unfit (*e*). And by a modern act of parliament (*f*), now repealed, power was given to the judges of the Court of Chancery (*g*), upon the petition of the mother of any infant, being in the sole custody of the father, or of any person by his authority, or of any guardian after the death of the father, to make order for the access of the petitioner to such infant, at such time and subject to such regulations as should be deemed convenient and just; and, if such infant should be within the age of seven years, to make order that such infant should be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as should be deemed convenient and just. If adultery had been established against the mother, no order could be made in her favour under this act (*h*). But the recent act to amend the law as to the custody of infants (*i*) has repealed this act (*h*), and now provides that after the passing of the act, it shall be lawful for the Court of Chancery, upon hearing the petition by her next friend of the mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants at such times, and subject to such regulations, as the court shall deem proper, and to order that such infant or infants shall be delivered to the mother, and remain in or under her custody or control; or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the court shall direct: and further to order that such custody or control shall be subject to such regulations as

Act to amend the law as to the custody of infants.

(*e*) *Cruise* v. *Hunter*, 2 Bro. C. C. 400; *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1; *Rex* v. *Greenhill*, 4 Adol. & Ell. 624; *Swift* v. *Swift*, L. J., 11 Jur., N. S. 458; 34 Law Journ. Chancery, 394; 34 Beav. 266.

(*f*) Stat. 2 & 3 Vict. c. 54; *Ex parte Bartlett*, 2 Coll. 661.

(*g*) *In re Taylor*, 10 Sim. 291.

(*h*) Stat. 2 & 3 Vict. c. 54, s. 4.

(*i*) Stat. 36 Vict. c. 12, passed 21th April, 1873.

(*k*) Sect. 3.

regards access by the father or guardian of such infant or infants, and otherwise as the said court shall deem proper (*l*). And the act further provides (*m*) that no agreement contained in any separation deed made between the father and mother of an infant or infants, shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: provided always that no court shall enforce any such agreement if the court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto.

Court for Divorce and Matrimonial Causes.

The jurisdiction anciently possessed by the ecclesiastical courts over matrimonial causes has been transferred to a new court, called the Court for Divorce and Matrimonial Causes, which has been established since the eleventh of January, 1858 (*n*). Instead of the ancient decree for a divorce à mensâ et thoro, a decree for a judicial separation has been substituted, which has the same force and consequences (*o*).

Dissolution of marriage.

The very doubtful benefit formerly enjoyed only by the richer classes of obtaining by act of parliament a dissolution of the marriage with liberty to marry again, is now extended to all persons by petition to the court (*p*).

Protection of wife deserted by her husband.

A beneficial provision has however been inserted empowering a woman, who has been deserted by her husband, to apply to a magistrate or to the court or the judge ordinary thereof, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion, against her husband or his creditors; and in

(*l*) Stat. 36 Vict. c. 12, s. 1.

(*m*) Sect. 2.

(*n*) Stat. 20 & 21 Vict. c. 85, amended by stats. 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61; 23 & 24 Vict. c. 144; 25 & 26 Vict. c. 81; 29 & 30 Vict. c. 32; 31 & 32 Vict. c. 77; and 36 Vict. c. 31, now called the Matrimonial Causes Acts.

(*o*) Stat. 20 & 21 Vict. c. 85, s. 7.

(*p*) Sects. 27, 57.

such case her earnings and her property, whether held beneficially or as executrix, administratrix or trustee, and whether in possession or reversion, will belong to herself as if she were a feme sole (*q*). And now, as we have already seen (*r*), the Married Women's Property Act, 1870 (*s*), provides (*t*), that the wages and earnings of any married woman acquired by her in any employment carried on by her separately from her husband shall be for her separate use. In every case of a decree either for judicial separation or for the dissolution of the marriage, the court has power to order the husband to secure to the wife for her life a separate maintenance under the name of alimony, either by annual, monthly or weekly payments (*u*). And in every case of a judicial separation the wife is, from the date of the sentence and whilst separated, to be considered as a feme sole with respect to her property, whether held beneficially or as executrix, administratrix or trustee, and also for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her property may be disposed of by her in all respects as a feme sole; and on her decease the same will, in case she shall die intestate, go as it would have gone if her husband had then been dead (*x*). If, however, alimony has been ordered to be paid to the wife, and the same shall not be duly paid by the husband, he will be liable for necessaries supplied for her use. But the wife may, during such separation, join with the husband in the exercise of any joint power given to herself and him (*y*). And if the wife should again cohabit with her

Alimony.

Judicial separation.

Wife a feme sole.

(*q*) Stat. 20 & 21 Vict. c. 85, s. 21, amended by stat. 27 & 28 Vict. c. 44; 21 & 22 Vict. c. 108, ss. 6, 7, 8, 9, 10; *Re Kingsley's Trust*, 26 Beav. 84; *Cooke* v. *Fuller*, 26 Beav. 99; *Re Whittingham*, V.-C. W., 10 Jur., N. S. 818.

(*r*) *Ante*, p. 389.

(*s*) Stat. 33 & 34 Vict. c. 93.

(*t*) Sect. 1.

(*u*) Stats. 20 & 21 Vict. c. 85, ss. 24, 32; 29 Vict. c. 32.

(*x*) Stat. 20 & 21 Vict. c. 85, ss. 25, 26; 21 & 22 Vict. c. 108, s. 7; *Re Insole*, 35 Beav. 92.

(*y*) Stat. 20 & 21 Vict. c. 85, s. 26.

husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate (*z*). In every case of a suit for judicial separation or for nullity or dissolution of marriage, the court or the judge ordinary is empowered, either before or after its final decree, to make provision with respect to the custody, maintenance and education of the children of the marriage, or for placing the children under the protection of the Court of Chancery (*a*). Whenever the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, it has power to order a settlement to be made of her property, whether in possession or reversion, for the benefit of the innocent party and the children of the marriage, or either or any of them (*b*). And any instrument executed pursuant to any order of the court made under this enactment, at the time of or after the pronouncing of a final decree of divorce or judicial separation, shall be deemed valid and effectual in the law, notwithstanding the existence of the disability of coverture at the time of the execution thereof (*c*). And after a decree of nullity or dissolution of marriage, the court may inquire into the existence of antenuptial or postnuptial settlements made on the parties whose marriage is the subject of the decree, and may make such order with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the court shall seem fit (*d*). But this provision does not

Custody, maintenance and education of children.

Settlement on judicial separation.

Dissolution of marriage.

Settled property.

(*z*) Stat. 20 & 21 Vict. c. 85, s. 25.

(*a*) Sect. 35; 22 & 23 Vict. c. 61, s. 4.

(*b*) Stat. 20 & 21 Vict. c. 85, s. 45.

(*c*) Stat. 23 & 24 Vict. c. 144, s. 6, made perpetual by stat. 25 & 26 Vict. c. 81.

(*d*) Stat. 22 & 23 Vict. c. 61, s. 5.

appear to apply if there be no child of the marriage living at the date of the order (*e*). When the marriage is dissolved on the wife's petition, the trusts in her favour contained in her marriage settlement take effect as if her husband were dead (*f*).

Comparison of the law of husband and wife as to real and as to personal estate.

A comparison of the laws of husband and wife relating to real estate, with those which affect personal property, will show a great discrepancy between them. Historically, no doubt, this discrepancy is easily accounted for; but practically, as things now exist, it is not so easy to give a satisfactory reason for the difference. Since the intended amendment of the law relating to dower, the wife's rights in her husband's real estate have, for the satisfaction of conveyancers, been reduced to as low a level as her rights in his personalty. But the husband's rights in his wife's property still materially vary, according as it may happen to be invested in real or in personal estate. If it consist of real estate, he has only a life interest as tenant by the curtesy, provided he has issue by his wife born alive, who might by possibility inherit as her heir (*g*). If it be personal estate, he has a right, subject to the exceptions introduced by the Married Women's Property Act, 1870 (*h*), to appropriate to himself all that he can lay hands on. Again, the real estate of the wife is guarded from alienation by the most careful provisions. Formerly the fictitious and cumbersome machinery of a *fine* was requisite; and now every conveyance of her real estate must be not only signed by her, but also *acknowledged* by her

(*e*) *Thomas* v. *Thomas*, 2 Sw. & Tr. 89; *Corrance* v. *Corrance*, 16 W. R. 893; L. R., 1 P. & D. 495; *Graham* v. *Graham*, 17 W. R. 628.

(*f*) *Fussell* v. *Dowding*, M. R., Law Rep., 14 Eq. 421; *Codrington* v. *Lindsay*, 20 W. R. 934.

(*g*) See Principles of the Law of Real Property, 167, 1st ed.; 177, 2nd ed.; 184, 3rd ed.; 185, 4th ed.; 193, 5th ed.; 203, 6th ed.; 209, 7th ed.; 218, 8th and 9th eds; 220, 10th ed.

(*h*) Stat. 33 & 34 Vict. c. 93; *ante*, pp. 389, 390.

before commissioners, apart from her husband, as her own act and deed (*i*). Recently the same principle has been applied to the release of her equity to a settlement, and to the assignment of her reversionary interests (*k*). But, in all cases not within the act for these purposes, the assignment of her personal estate, if made at all, can only be made by her husband; and her concurrence or objection is quite immaterial. When personal estate consists of mere moveable articles, the nature of the property no doubt affords a sufficient reason for the difference between the laws which dispose of it, and those which regulate estates in fixed and immoveable landed property. But when personalty assumes the form of such solid investments as mortgages or consols, when it becomes like land disposable by deed rather than by delivery, the laws which affect it should rather depend on its present nature than on its past history. It seems hardly fair that a married woman should have no voice in the disposition of property of this kind belonging to herself. At the same time, the present system of taking her acknowledgment on a conveyance of her real estate is often found to be a burdensome expense without any practical benefit. For if a husband can persuade his wife to sign a deed, he can easily prevail on her to make an acknowledgment before two commissioners, notwithstanding that during the two minutes which the transaction lasts she may remain "separate and apart" from him. If, whenever the wife's property of any kind should be alienated by deed, her signature were necessary, but her separate examination were dispensed with, the law both of personal and real estate would perhaps be improved. The Court of Chancery, by the establishment of trusts for separate use, and

Acknowledgment by wife on conveyance of real estate.

(*i*) See Principles of the Law of Real Property, 171, 1st ed.; 181, 2nd ed.; 188, 3rd ed.; 189, 4th ed.; 197, 5th ed.; 207, 6th ed.; 213, 7th ed.; 222, 8th and 9th eds.; 224, 10th ed.

(*k*) Stat. 20 & 21 Vict. c. 57; *ante*, p. 395.

by giving the wife an equity to a settlement of part of her personal property when claimed through the medium of that court, has done much to mitigate the simple rigour of the common law. Trusts for separate use are now, after much wavering, firmly settled, it is to be hoped, into a system according both with the interests of the community and the general principles of the law. Such trusts, however, generally require to be established by deed or will, and are very seldom implied. And the wife cannot assert her equity to a settlement without taking the serious step of making an application to the Court of Chancery. The theory of that court certainly is, that its assistance is free and open to everybody, and that those who neglect to avail themselves of its aid suffer by their own fault. Experience, however, is too apt to suggest that the remedy may sometimes prove worse than the disease. The Married Women's Property Act, 1870 (*l*), is an improvement so far as it goes; but its provisions are very partial and defective.

(*l*) Stat. 33 & 34 Vict. c. 93; *ante*, pp. 137, 389, 390.

PART V.

OF TITLE.

THE title to personal estate varies according as it may consist of money or negotiable securities, or of ordinary choses in possession, or of choses in action.

Money and negotiable securities.

And, first, with regard to money or negotiable securities, no title at all is required to be shown by the payer in any *bonâ fide* transaction. Thus, if a sovereign or a bank note be offered in payment of a debt, it is no part of the duty of the creditor, under ordinary circumstances, to ask the debtor how he came by it. The reason of this rule is founded on the currency of the articles in question, and on the great inconvenience to trade and commerce which would ensue if the rule were otherwise (*a*). And the rule applies to all negotiable securities, that is, to all instruments the delivery of which passes the legal right to the property secured by them. Promissory notes and bills of exchange payable to bearer, or payable to order, and indorsed in blank, are accordingly within the rule (*b*). But if there be any *mala fides* on the part of the person receiving any money or negotiable security, or such gross negligence as may amount in itself to evidence of *mala fides*, the true owner may recover such property, provided its identity can be ascertained (*c*). A delivery order does not of itself

Delivery order.

(*a*) *Miller* v. *Race*, 1 Burr. 452; 1 Smith's Leading Cas. 250.

(*b*) *Grant* v. *Vaughan*, 3 Burr. 1516; *Peacock* v. *Rhodes*, 2 Doug. 633; see *ante*, p. 92.

(*c*) *Clarke* v. *Shee*, Cowp. 197; *Foster* v. *Pearson*, 1 C. M. & R. 849; S. C., 5 Tyrw. 255; *Goodman* v. *Harvey*, 4 Ad. & Ell. 870.

pass the property in the goods mentioned in it; it is therefore not a negotiable security within the rule above mentioned; and the transferee is accordingly bound to inquire into the title of the transferor (*d*).

Sale of chattels in market overt.

With regard to ordinary choses in possession, a valid title to them is generally obtained by a purchase in an open market, or *market overt*, although no property may have been possessed by the vendor (*e*). And every shop in the city of London, where goods are openly sold, is considered as a market overt within this rule, for such things as by the trade of the owner are put there for sale (*f*). But the shops at the west end of the town do not appear to possess this privilege. If the sale is not made in market overt, the purchaser, though he purchase *bonâ fide*, acquires no further property in the article sold than was possessed by the vendor (*g*). And formerly, if a writ of execution should have been actually in the hands of the sheriff on a judgment against the vendor, the goods, if not sold in market overt, were subject, in the hands of the purchaser, to the sheriff's right to seize, in the same manner as if they had remained in the hands of the vendor (*h*). But a recent enactment now protects a purchaser *bonâ fide* for valuable consideration, without notice of any writ (*i*).

Stolen goods.

So if the goods have been stolen, a *bonâ fide* purchaser, who has not bought them in market overt, will be bound to restore them to the true owner (*j*); whereas, a sale in market overt would have given the purchaser

(*d*) *Kingsford* v. *Merry*, 1 H. & N. 503.

(*e*) 2 Black. Com. 449.

(*f*) *The case of Market Overt*, 5 Rep. 83 b; *Lyons* v. *De Pass*, 11 Ad. & Ell. 326.

(*g*) *Peer* v. *Humphrey*, 2 Ad. & El. 495; *White* v. *Spettigue*, 13 Mee. & W. 603.

(*h*) *Samuel* v. *Duke*, 3 Mee. & W. 622. See *ante*, p. 53.

(*i*) Stat. 19 & 20 Vict. c. 97, s. 1, *ante*, p. 54, not retrospective. *Williams* v. *Smith*, 2 H. & N. 443.

(*j*) *White* v. *Spettigue*, 13 Mee. & W. 603.

a valid title. There is one case, however, in which even a sale in market overt will not protect a purchaser, namely, the case of the goods having been stolen, and the true owner prosecuting the thief and obtaining his conviction. In this case the property in the goods, wherever they may be, vests, on the conviction, in the true owner (*k*); and the only exception allowed is, where the article stolen is some valuable security, which shall have been paid or discharged *bonâ fide* by the person liable, or, being a negotiable instrument, shall have been *bonâ fide* transferred or delivered for a just and valuable consideration, without any notice, and without any reasonable cause to suspect that the same had been obtained by any felony or misdemeanor (*l*). If a person suffer the loss of his goods by theft, he cannot by any civil action recover them from the felon (*m*). To do this, he is bound to suffer the further loss of time or money incurred in a prosecution. If he should succeed in obtaining a conviction, he is then rewarded for his good fortune by a restitution of his property, whether in the hands of the felon himself, or of any innocent purchaser who may have chanced to buy them, although in open market. Such is the application made by the law of the righteous principle of restitution (*n*).

Horses.

With regard to horses, a sale in market overt will not confer on the purchaser any further title than is possessed by the vendor, unless the sale be made according to the directions of certain statutes (*o*); and even then the true owner may, at any time within six

(*k*) *Scattergood* v. *Sylvester*, 15 Q. B. 506.

(*l*) Stat. 7 & 8 Geo. IV. c. 29, s. 57, repealed by stat. 24 & 25 Vict. c. 95, and re-enacted by stat. 24 & 25 Vict. c. 96, s. 100.

(*m*) *Stone* v. *Marsh*, 6 Barn. & Cress. 551, 564; 2 Wms. Saund. 47 b, n. (*p*).

(*n*) See *Chowne* v. *Baylis*, 31 Beav. 351.

(*o*) Stats. 2 & 3 P. & M. c. 7; 31 Eliz. c. 12; 2 Black. Com. 450.

months after his horse has been stolen, recover his property on tender to the person in possession of the price he *bonâ fide* paid for it (*p*).

Factors and agents.

A factor or agent in the possession of goods could not by the common law give any further title to the goods than he was authorized to do by his principal, either expressly or by implication arising from the usual course of his employment (*q*). And when one man is appointed the agent of another for any particular purpose by power of attorney, his authority must still be strictly pursued, otherwise his principal will not be bound (*r*). But by modern acts of parliament a more extended authority has, for the convenience of commerce, been conferred on factors and agents (*s*). The provisions of these acts are too long to be here inserted; but their general effect is to render valid sales and pledges made by factors or agents, notwithstanding any notice of the fact of their being merely factors or agents, provided the party dealing with them have no notice that they are acting without authority or *malâ fide*.

Power of attorney.

Decease of person giving power of attorney.

The authority of an agent acting under a power of attorney, determines by the decease of the person giving the power (*t*). But by a recent act, no trustee, executor or administrator making any payment or doing any act *bonâ fide* in pursuance of any power of attorney, in ignorance of the death of the person who gave the power, or of his having done some act to avoid the power, shall be liable for the money so paid or the act so done (*u*).

New enactment.

(*p*) Stat. 31 Eliz. c. 12, s. 4.

(*q*) *Pickering* v. *Busk*, 15 East, 38, 43.

(*r*) *Attwood* v. *Munnings*, 7 Barn. & Cress. 278.

(*s*) Stats. 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; 5 & 6 Vict. c. 39.

(*t*) Bacon's Abridgment, tit. Authority (E); *Lepard* v. *Vernon*, 2 Ves. & Bea. 51. Otherwise where expressed to be valid notwithstanding death. *Kiddill* v. *Farnell*, 3 Sma. & Gif. 428.

(*u*) Stat. 22 & 23 Vict. c. 35, s. 26.

Warranty.

In ancient times the sale of lands was usually accompanied by a warranty of their title; and some words, such as the word *give* in a feoffment, had the effect of an implied warranty, when none was expressed (*v*). When warranties fell into disuse, the purchasers of lands acquired a right to covenants for the title, varying in their stringency according to the nature of the title of the vendor (*x*). No warranty however arises from the mere sale of goods, unless it be expressly given, or implied from the custom of the trade or the nature of the contract (*y*); but the sale of goods in an open shop or warehouse has lately been held to be an implied warranty that the seller is the owner of the goods (*z*). Every affirmation made by the vendor at the time of sale respecting the goods is an express warranty, if it appear to have been so intended (*a*). And if the vendor state that the goods are his own, this amounts to a warranty of his title (*b*); but if the contract for sale be in writing, the warranty must be in writing also (*c*). And a warranty made subsequently to the sale is void for want of consideration (*d*). Contracts made in the course of any trade are always subject to the custom of that trade; and if by the custom of the trade a warranty is implied in any contract, the vendor

(*v*) See Principles of the Law of Real Property, 344, 1st ed.; 346, 2nd ed.; 359, 3rd ed.; 365, 4th ed.; 376, 5th ed.; 399, 6th ed.; 407, 7th ed.; 426, 8th ed.; 423, 9th ed.; 426, 10th ed.

(*x*) Ibid. 348, 1st ed.; 349, 2nd ed.; 362, 3rd ed.; 368, 4th ed.; 379, 5th ed.; 402, 6th ed.; 410, 7th ed.; 429, 8th ed.; 426, 9th ed.; 429, 10th ed.

(*y*) *Chanter* v. *Hopkins*, 4 Mee. & W. 399; *Burnby* v. *Bollett*, 16 Mee. & W. 644; *Morley* v. *Attenborough*, 3 Exch. Rep. 500; *Bagueley* v. *Hawley*, L. R., 2 C. P. 625.

(*z*) *Eicholtz* v. *Bannister*, C. P., 11 Jur., N. S. 15; 17 C. B., N. S. 708.

(*a*) See *Richardson* v. *Brown*, 1 Bing. 344; *Sheppard* v. *Kain*, 5 Barn. & Ald. 240; *Power* v. *Barham*, 4 Ad. & Ell. 473; *Carter* v. *Crick*, 4 H. & N. 412.

(*b*) *Furniss* v. *Leicester*, Cro. Jac. 474; *Medina* v. *Stoughton*, 1 Salk. 210.

(*c*) *Pickering* v. *Dowson*, 4 Taunt. 779.

(*d*) Finch, L. 189. See *ante*, p. 78.

will be bound by it, in the same manner as if he had given an express warranty (*e*). So the nature of the contract may be such as to imply a warranty. Thus a contract to furnish goods for a particular purpose, contains an implied warranty that they are fit for that purpose (*f*); and a contract to furnish manufactured goods implies a warranty that they shall be of a merchantable quality (*g*). And an important addition to the law of warranty has been made by the Merchandise Marks Act, 1862, to the provisions of which we have before referred (*h*).

Statute of Limitations.

If goods and chattels should have come into the possession of persons having no title to them, such persons will, in course of time, be quieted in their enjoyment by virtue of the Statute of Limitations (*i*). By this statute all actions of trespass, detinue and replevin for goods or cattle must be brought within *six* years next after the cause of such action (*j*); but if the person entitled to any such action be under age, *feme covert*, or *non compos mentis*, such person shall be at liberty to bring the same action within *six* years after the disability is removed (*k*). The disabilities of absence beyond seas and imprisonment have been abolished by a recent statute (*l*).

Disabilities.

Statutes of Limitation as to choses in action.

Choses in action, whether legal or equitable, differ from choses in possession in this, that the title to them is endangered rather than strengthened by the Statutes of Limitation. This difference arises from the nature of the property. Goods and chattels may exist without

(*e*) *Jones* v. *Bowden*, 4 Taunt. 847.

(*f*) *Jones* v. *Bright*, 5 Bing. 533; *Brown* v. *Edgington*, 2 Man. & Gr. 279.

(*g*) *Laing* v. *Fidgeon*, 6 Taunt. 108.

(*h*) Stat. 25 & 26 Vict. c. 88, *ante*, pp. 267, 268.

(*i*) Stat. 21 Jac. I. c. 16.

(*j*) Sect. 3.

(*k*) Sect. 7.

(*l*) Stat. 19 & 20 Vict. c. 97, ss. 10, 12.

any owner; but if there cease to be a person entitled to a debt, the debt itself ceases to exist. The time within which actions or suits may be brought for the recovery of choses in action varies according to the nature of the security. The law on this subject has been rendered somewhat difficult by two different acts of parliament (*m*) varying from each other, each passed the same session of parliament, and each intended to amend the law. The following, however, appear to be the distinctions. If the chose in action be money secured by any mortgage, judgment (*n*) or lien, or otherwise charged upon or payable out of any real estate at law or in equity, or any legacy (*o*), or the personal estate or any share of the personal estate of a person who has died intestate (*p*), no action or suit can be brought to recover the same but within *twenty years* next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same; unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent (*q*), to the person entitled thereto or his agent (*r*); and in such case no such action or suit shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was made or given (*s*). If the chose in action be rent due upon an indenture of demise, or money secured by bond or other specialty, or by a recognizance, an action must also be brought within

Mortgages, judgments and legacies.

Rent secured by indenture, and money secured by bond, specialty or recognizance.

(*m*) Stats. 3 & 4 Will. IV. cc. 27, 42.

(*n*) *Watson* v. *Birch*, 15 Sim. 523.

(*o*) *Sheppard* v. *Duke*, 9 Sim. 567.

(*p*) Stat. 23 & 24 Vict. c. 38, s. 13.

(*q*) *Lord St. John* v. *Boughton*, 9 Sim. 219.

(*r*) *Blair* v. *Nugent*, 3 Jones & Lat. 673, 677.

(*s*) Stat. 3 & 4 Will. IV. c. 27, s. 40.

twenty years after the cause of such action (*t*), or within twenty years after the removal of any of the disabilities of infancy, coverture or lunacy (*u*). And if any person against whom there is any such cause of action shall be beyond the seas at the time such cause of action accrued, the person entitled to any such cause of action may bring the same against him within twenty years after his return (*v*). And the absence of a joint debtor beyond the seas will not prevent time from running in favour of the others, who may not be beyond the seas; and the recovery of judgment against them will not prevent the creditor from commencing an action against the absent debtor after his return (*x*). If any acknowledgment shall have been made, either by writing signed by the party liable (*y*), or his agent, or by part payment or part satisfaction on account of any principal or interest then due, the person entitled may bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment, or within twenty years after any of the above-mentioned disabilities shall have ceased, or the party liable shall have returned from beyond the seas, as the case may be (*z*). If the chose in action consist of arrears of dower, neither such arrears nor damages on account thereof can be recovered or obtained by any action or suit for a longer period than *six years* next before the commencement of such action or suit (*a*). Arrears of rent or of interest in respect of any sum of

Absence beyond seas.

Arrears of dower.

Arrears of

(*t*) Stat. 3 & 4 Will. IV. c. 42, s. 3.

(*u*) Stat. 3 & 4 Will. IV. c. 42, s. 4; 19 & 20 Vict. c. 97, s. 10; *Pardo* v. *Bingham*, L. C., 17 W. R. 419.

(*v*) Stat. 3 & 4 Will. IV. c. 42, s. 4.

(*x*) Stat. 19 & 20 Vict. c. 97, s. 11.

(*y*) See *Roddam* v. *Morley*, 1 De Gex & Jones, 1; *Moodie* v. *Bannister*, 4 Drew. 432; *Coope* v. *Cresswell*, L. C., Law Rep., 2 Ch. Ap. 112.

(*z*) Stat. 3 & 4 Will. IV. c. 42, s. 5; *Kempe* v. *Gibbon*, 9 Q. B. 609.

(*a*) Stat. 3 & 4 Will. IV. c. 27, s. 41.

arrears of rent and interest.

6 years

money charged upon or payable out of any real estate or in respect of any legacy, can be recovered only within *six years* next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent (*b*). But if such arrears are secured to the claimant (*c*) by indenture of demise (*d*), or by bond or other specialty (*e*), an action of debt or covenant may be brought for such arrears at any time within twenty years. And where a mortgagee or other incumbrancer shall have been in possession of any real estate within one year next before the action or suit of a subsequent mortgagee or incumbrancer, the latter may recover the arrears of interest which may have become due to him during the whole time that the prior mortgagee or incumbrancer was in possession (*f*).

Simple contract debts.

6 yrs

If the chose in action consist of a simple contract debt, it must be sued for within *six years* next after the cause of action, or within *six* years next after the removal of any of the disabilities of infancy, coverture or lunacy (*g*). And no acknowledgment or promise by words only to pay such debt shall be deemed sufficient evidence of a new or continuing contract to take the case out of the operation of the statute, unless such acknowledgment or

(*b*) Stat. 3 & 4 Will. IV. c. 27, s. 42; *Hodges* v. *Croydon Canal Company*, 3 Beav. 86; *Francis* v. *Grover*, 5 Hare, 39; *Humfrey* v. *Gery*, 7 C. B. 567. See *Toft* v. *Stevenson*, 5 De Gex, M. & G. 735; *Mason* v. *Broadbent*, 33 Beav. 296; *Edmund* v. *Waugh*, V.-C. K., 14 W. R. 257; 1 Law Rep., Eq. 418; *Bowyer* v. *Woodman*, V.-C. W., Law Rep., 3 Eq. 313.

(*c*) *Hughes* v. *Kelly*, 3 Dru. & Warren, 482.

(*d*) *Paget* v. *Foley*, 2 New Ca. 679.

(*e*) *Sims* v. *Thomas*, 12 Ad. & Ell. 536; *Hunter* v. *Nockolds*, 1 Mac. & Gord. 640. See *Elvy* v. *Norwood*, 5 De Gex & Smale, 240; *Sinclair* v. *Jackson*, 17 Beav. 405.

(*f*) Stat. 3 & 4 Will. IV. c. 27, s. 42.

(*g*) Stat. 21 Jac. I. c. 16, ss. 3, 7; 19 & 20 Vict. c. 97, ss. 10, 12.

promise shall be made in writing, signed by the party chargeable thereby (*h*) or his agent (*i*). Actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, must also be brought within *six years* after the cause of action, with a similar saving in respect of disabilities to that applicable in the case of actions on indentures of demise, bonds or other specialties (*k*). And actions for penalties, damages or sums of money given to the party grieved by any statute now or hereafter to be in force, must be brought within *two years* after the cause of such actions, with the like saving in respect of disabilities, unless the time for bringing such action is or shall be by any statute specially limited (*l*).

Awards, fines for copyholds, &c.

Penalties, &c. given to the party grieved

When a cause of action accrues to a person in his lifetime, the time limited by the Statutes of Limitation will run on after his decease from the period that the cause of action accrued, and will not be reckoned from the time that administration was taken out to his effects (*m*). But if the cause of action accrue after the death of the party, the time limited by the statute will run only from the grant of the letters of administration (*n*). On the other hand, the death of the debtor and the absence of any personal representative to his effects, will not prevent the time limited by the statute from continuing to run on. For if there be once a cause of action, a plaintiff that can sue, and a defendant that can be sued in England, the time limited by the statute will begin to run, and will not be stopped by the

Death of creditor.

Death of debtor.

(*h*) Stat. 9 Geo. IV. c. 14, s. 1.

(*i*) Stat. 19 & 20 Vict. c. 97, s. 13; see *ante*, pp. 82, 87.

(*k*) Stat. 3 & 4 Will. IV. c. 42, ss. 3, 4; see *ante*, p. 419.

(*l*) Stat. 3 & 4 Will. IV. c. 42, ss. 3, 4.

(*m*) 2 Wms. Saund. 63 k.

(*n*) *Murray* v. *East India Company*, 5 Barn. & Ald. 204; *Perry* v. *Jenkins*, 1 Mylne & Cr. 118.

Executor or administrator not bound to plead the statute.

decease of either party (*o*). An executor or administrator is not, however, bound to plead the Statute of Limitations to any debt or demand, but may, if he please, pay the same notwithstanding the time limited by the statute may have expired (*p*). But if the estate be administered in the Court of Chancery, any party to the suit is competent to take the objection, although the executor may not have insisted on it (*q*).

Charge of real estate for payment of debts.

Notwithstanding the period of six years limited for the payment of simple contract debts, the debtor may by charging his real estate by his will with the payment of his debts, and, *à fortiori*, by creating an express trust for their payment out of his real estate, prevent the operation of the statute on all such debts as have not been barred by the statute in his lifetime (*r*). Real estate, it will be remembered, was not formerly liable to the payment of any debts which were not secured by specialty binding the heirs (*s*); and the alteration, which in this respect has been made in the law, affects only such real estates as have not been charged by the deceased with the payment of his debts. The creditors therefore in whose favour the charge is made acquire, as before the alteration, the character of *cestui que trusts*; and in equity they will not be allowed to lose their debts, because they do not go to law to enforce payment when they have a trustee to pay them (*t*). But after

(*o*) *Rhodes* v. *Smethurst*, 6 Mee. & Wels. 351; *Freake* v. *Cranefeldt*, 3 Mylne & Cr. 499; *Sturgis* v. *Darrell*, 6 H. & N. 120.

(*p*) *Norton* v. *Freeker*, 1 Atk. 526; *Ex parte Dewdney*, 15 Ves. 498. See *Stahlschmidt* v. *Lett*, 1 Sma. & Giff. 415.

(*q*) *Sherren* v. *Vanderhorst*, 1 Russ. & M. 347; 2 Russ. & M. 75.

(*r*) *Burke* v. *Jones*, 2 Ves. & Beames, 275; *Hughes* v. *Wynne*, Turn. & Russ. 307; *Crallan* v. *Oulton*, 3 Beav. 1.

(*s*) See Principles of the Law of Real Property, 57, 1st ed.; 61, 2nd ed.; 64, 3rd and 4th eds.; 68, 5th ed.; 72, 6th ed.; 74, 7th ed.; 75, 8th ed.; 77, 9th ed.; 78, 10th ed.; *ante*, p. 112.

(*t*) Turn. & Russ. 309.

twenty years the charge, if not enforced, will be barred like any other charge (*u*). An express trust, however, is proof against any length of time (*v*). But as personal estate has always been primarily liable to the payment of all debts, a trust created by a testator for the payment of his debts out of his personal estate will not prevent the operation of the statute (*x*).

Unclaimed dividends.

When the dividends upon any stock transferable at the Bank of England have not been claimed for ten years, such stock, together with the unclaimed dividends, is transferred to the account of the commissioners for the reduction of the national debt (*y*); and such dividends, together with all the future dividends on the stock, are invested by the commissioners in the purchase of like stock, so as to accumulate (*z*). And the governor or deputy governor of the bank for the time being may order the transfer of such stock and the payment of the dividends to any person showing, to his satisfaction, a right thereto; but in case such governor or deputy governor shall not be satisfied of the justice or legality of the claim, an order for transfer and payment may be obtained from the Court of Chancery by petition in a summary way, stating and verifying the claim (*a*). But no such transfer of stock or payment of dividends, exceeding the sum of 20*l.*, can be made until three calendar months after the application, nor until notice

(*u*) *Dundas* v. *Blake*, 11 Ir. Eq. Rep. 138; Sug. Real Prop. Stat. p. 107; *Jacquet* v. *Jacquet*, 27 Beav. 322; *Dickinson* v. *Teesdale*, 31 Beav. 511.

(*v*) See the author's Essay on Real Assets, p. 40.

(*x*) *Scott* v. *Jones*, 4 Cl. & Fin. 382; *Freake* v. *Cranefeldt*, 3 My. & Cr. 499.

(*y*) Stat. 33 & 34 Vict. c. 71, s. 51. The former acts on this subject, stats. 56 Geo. III. c. 60; 8 & 9 Vict. c. 62, and 24 Vict. c. 3, s. 8, are now repealed by stat. 33 & 34 Vict. c. 69.

(*z*) Stat. 33 & 34 Vict. c. 71, s. 54.

(*a*) Sect. 55; *Ex parte Ram*, 3 My. & Craig, 25; *Hunt* v. *Peacock*, 6 Hare, 361.

has been advertised in one or more newspapers circulating in London and elsewhere, as the governor and company of the bank shall think fit; which notice must state the name, residence and description of the person in whose name the unclaimed stock or dividends stood when transferred to the commissioners, and the amount thereof, and the name of the claimant, and the time at which the transfer or payment will be made if no other claimant shall sooner appear and make out his claim. And when the stock or dividends are directed to be transferred or paid by any order of the Court of Chancery, the notice must also state the purport of such order (*b*); and any person may at any time before the actual retransfer of the stock, or payment of the dividends to any such claimant, apply to the Court of Chancery by motion or petition to rescind or vary any order made for such transfer or payment (*c*).

Notice of assignment of *choses in action.*

When a chose in action, whether legal or equitable, is transferred from one person to another, notice of the assignment should be given by the transferee to the person liable to the action at law or suit in equity, the right to bring which is the subject of the transfer (*d*). Thus if a debt be assigned, notice of the assignment should be given to the debtor. If the subject of the assignment be the right to stock standing in the name of a trustee, notice of the assignment should be given to such trustee. Until such notice be given, it is evident that the debtor may innocently pay the debt, or the trustee transfer the stock to the transferor; or the transferor may fraudulently transfer his right over again to a third person. The transferee, therefore, until he has given notice to the party liable, has not done all that lies in his power to perfect his title. The chose in

(*b*) Stat. 33 & 34 Vict. c. 71, ss. 56, 57.

(*c*) Sect. 58.

(*d*) *Dearle* v. *Hall*, *Loveridge* v. *Cooper*, 3 Russ. 1; *Bright's Trusts*, 21 Beav. 430.

action still remains the apparent property of the transferor; and in the event of his bankruptcy it will pass to the trustee for his creditors as property in his order and disposition with the consent of the true owner thereof (*e*). This, however, is now partly altered by the Bankruptcy Act, 1869, which expressly excepts things in action, other than debts due to the bankrupt in the course of his trade or business (*f*); but the expression "things in action" has been held not to include shares in a joint-stock company, in respect of which no action need be brought, the owner's title depending upon the register (*g*). Even the assignees themselves would formerly not have been safe, unless they had given a similar notice to the person liable to the action, the right to bring which was transferred to them by the bankruptcy (*h*). The importance of giving notice suggests the precaution that every person about to accept an assignment of a chose in action should inquire of the person liable to the action or suit, whether he has had notice of any prior assignment. And if there be two or more persons liable, inquiry should be made of every one of them; for notice by a prior assignee to any one of them would be equivalent to notice to all (*i*). It is also advisable that a written answer should be obtained to every such inquiry, in order that if the assignee should be misled by a false answer, he may be enabled to recover damages for the misrepresentation. For it has been doubted whether the answer to such

Bankruptcy of transferor.

Inquiry as to prior assignments.

(*e*) *Ex parte Munro*, Buck, 300; *Williams* v. *Thorpe*, 2 Sim. 257; *Thompson* v. *Spiers*, 13 Sim. 469; *Bartlett* v. *Bartlett*, 1 De Gex & Jones, 127; *Re Hughes's Trusts*, 2 Hem. & Mil. 89; *Re Webb's Policy*, V.-C. M., 15 W. R. 529; see *ante*, p. 56.

(*f*) Stat. 32 & 33 Vict. c. 71, s. 15, par. (5).

(*g*) *Ex parte Union Bank of Manchester, In re Jackson*, Law Rep., 12 Eq. 354.

(*h*) *Re Barr's Trusts*, 4 Kay & J. 219.

(*i*) *Smith* v. *Smith*, 2 Cr. & M. 231; *Meux* v. *Bell*, 1 Hare, 73, 87. See *Browne* v. *Savage*, 4 Drew. 635, 640.

an inquiry be not a representation concerning the ability of the intended assignor within the meaning of Lord Tenterden's act, which requires that all such representations be made in writing signed by the party to be charged therewith (*k*). The inquiry, however, thus recommended will not of itself strengthen the title of the assignee, further than by assuring him that no previous assignment has been made. In order to obtain a good title, he must himself give notice to the person or one of the persons liable to the debt or demand assigned to him. When this has been done his title will be secure, and will prevail over that of any unknown prior assignee who may have omitted to give such notice (*l*). If the property consist of money or stock standing in the name of the paymaster-general, or of securities in his possession (*m*), an order of the court should be obtained restraining transfer or payment without notice to the assignee. This order is called a stop order, and will have the same effect as notice of assignment given to any private debtor (*n*). If the property be stock standing in the name of a trustee, who has died without any administration having been taken out to his effects, a *distringas* obtained by the assignee to restrain the transfer of the stock will confer on him the same priority as notice to the trustee would have done had he been living (*o*). When the property consists of a policy of assurance, or of shares in a joint-stock company, notice of the transfer should be given to the office of the company (*p*).

Stop order.

Distringas.

Policies and shares.

(*k*) *Lyde* v. *Barnard*, 1 Mee. & Wels. 101; *Swann* v. *Phillips*, 8 Ad. & E. 457; see *ante*, pp. 88, 89.

(*l*) *Dearle* v. *Hall*, *Loveridge* v. *Cooper*, 1 Russ. 1.

(*m*) *Williams* v. *Symonds*, 9 Beav. 523.

(*n*) *Greening* v. *Beckford*, 5 Sim. 195; *Swayne* v. *Swayne*, 11 Beav. 463.

(*o*) *Etty* v. *Bridges*, 2 Younge & Coll. N. C. 466; see *ante*, p. 214.

(*p*) *Williams* v. *Thorpe*, 2 Sim. 257; *Thompson* v. *Spiers*, 13 Sim.

And with respect to policies of life assurance, it is, as we have seen, now provided that a written notice of the date and purport of the assignment must be given to the company in order to pass the right to sue on the policy (*q*). Life policies.

The title to personal property sometimes depends upon deeds, wills or other documents of title of the like nature, and cannot be shown without their production. Thus a reversionary interest in money in the funds, settled by deed or will, may be mortgaged and sold again and again before it becomes an interest in possession. In these cases the purchaser is entitled to an abstract of the deeds, wills, &c. which compose the title, in the same manner as if the subject of the contract had been real estate; and the original deeds, and the probates or office copies of the wills, must also in like manner be produced for the verification of the abstract (*r*). The purchaser is also entitled either to the possession of the deeds, or, if this cannot be had, to attested copies of them, and a covenant for their production, at the expense of the vendor (*s*). And when an assignment of any kind of personal property is made by deed, it is usual for the assignor to enter into covenants for the title similar to those entered into under the like circumstances by the grantor of real estate (*t*). Title through deeds, wills, &c. Abstract of title. Covenants for title.

469; *West* v. *Reid*, 2 Hare, 249; *Martin* v. *Sedgwick*, 9 Beav. 333; *Powles* v. *Page*, 3 C. B. 16.

(*q*) Stat. 30 & 31 Vict. c. 144, s. 3; *ante*, p. 186.

(*r*) See Principles of the Law of Real Property, 349, 1st ed.; 351, 2nd ed.; 364, 3rd ed.; 370, 4th ed.; 381, 5th ed.; 404, 6th ed.; 412, 7th ed.; 431, 8th ed.; 428, 9th ed.; 431, 10th ed.; *Hobson* v. *Bell*, 2 Beav. 17.

(*s*) Ibid. 354, 356, 1st ed.; 356, 358, 2nd ed.; 369, 372, 3rd ed.; 375, 378, 4th ed.; 389, 5th ed.; 412, 6th ed.; 420, 7th ed.; 440, 8th ed.; 437, 9th ed.; 440, 10th ed.

(*t*) See Principles of the Law of Real Property, 348, 1st ed.; 349, 2nd ed.; 362, 3rd ed.; 368, 4th ed.; 379, 5th ed.; 402, 6th ed.; 410, 7th ed.; 429, 8th ed.; 426, 9th ed.; 429, 10th ed.

Title to shares.

The vendor of shares in a joint-stock company is bound merely to give such evidence of the constitution of the company, as to show that the proposed transfer will give a valid title to the shares sold (*u*).

A person may assign to himself.

An act of parliament of the present reign provides that any person shall have power to assign personal property, now by law assignable, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another (*x*). Before this act an assignment by A. to himself and B. of leasehold property or choses in possession vested the whole of the property in B. The same act renders criminally punishable the concealment, with intent to defraud, of any deed or instrument material to a title or of any incumbrance, or the falsification of any pedigree on which a title depends (*y*).

Comparison of the title to real and personal estate.

From what has been said it will appear that the title to personal property is far more simple than that to real estate. And amongst the plans which have appeared for the amendment of the law has been one for adapting the machinery of the funds to the transfer of landed property. Upon consideration, however, it will perhaps appear that the greater complexity of the title to lands arises partly from the nature of the property, and partly from the more full power of disposition to which lands are subject. Lands, unlike stock, may be converted from arable to pasture, may be cut up into roads, canals or railways, may be sold by the foot for building purposes, may be let upon lease for terms absolute or determinable, may be held for life, or in tail, as well as in fee, and may be disposed of by contingent remainders,

(*u*) *Curling* v. *Flight*, 2 Phil. 613.

(*x*) Stat. 22 & 23 Vict. c. 35, s. 21.

(*y*) Sect. 24, extended by stat. 23 & 24 Vict. c. 38, s. 8.

shifting uses and executory devises, without the intervention of any trustees. Personal property, on the contrary, cannot be settled without the intervention of trustees, in whom a great degree of personal confidence must necessarily be placed; but when so settled, the title to it is sometimes as long and intricate as that to real estate. If the nature of lands could be altered, or if landowners were willing, in order to save themselves expense, to give up some of their powers of disposition, the title to real estate might doubtless be rendered as simple as that to personal property. To the latter alternative, however, few, if any, would be inclined to submit. Whilst, therefore, much might be done to simplify and improve our laws of property by an assimilation of the rules of real and personal estate, where the history of each forms the only ground of variety, care should be taken to preserve untouched such distinctions as are founded on the broad basis of practical difference.

8/5/79

APPENDIX (A).

Referred to, p. 253.

Form of Letters Patent.

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith to all to whom these presents shall come greeting Whereas A. B. of —— hath by his petition humbly represented unto us that he is in possession of an invention for —— —— which the petitioner conceives will be of great public utility That he is the true and first inventor thereof and the same is not in use by any other person or persons to the best of his knowledge and belief The petitioner therefore most humbly prayed that we would be graciously pleased to grant unto him his executors administrators and assigns our royal letters patent for the sole use benefit and advantage of his said invention within our United Kingdom of Great Britain and Ireland the Channel Islands and Isle of Man [Colonies to be mentioned if any] for the term of fourteen years pursuant to the statutes in that case made and provided [And whereas the said A. B. hath particularly described and ascertained the nature of the said invention and in what manner the same is to be performed by an instrument in writing under his hand and seal and has caused the same to be duly filed in —— ——] And we being willing to give encouragement to all arts and inventions which may be for the public good are graciously pleased to condescend to the petitioner's request Know ye therefore that we of our especial grace certain knowledge and mere motion have given and granted and by these presents for us our heirs and successors do give and grant unto the said A. B. his executors administrators and assigns our especial licence full power sole privilege and authority that he the said A. B. his executors administrators and assigns and every of them by himself

and themselves or by his or their deputy or deputies servants or agents or such others as he the said A. B. his executors administrators or assigns shall at any time agree with and no others from time to time and at all times hereafter during the term of years herein expressed shall and lawfully may make use exercise and vend his said invention within our United Kingdom of Great Britain and Ireland the Channel Islands and Isle of Man (*a*) in such a manner as to him the said A. B. his executors administrators and assigns or any of them shall in his or their discretion seem meet and that he the said A. B. his executors administrators and assigns shall and lawfully may have and enjoy the whole profit benefit commodity and advantage from time to time coming growing accruing and arising by reason of the said invention for and during the term of years herein mentioned TO HAVE HOLD exercise and enjoy the said licences powers privileges and advantages hereinbefore granted or mentioned to be granted unto the said A. B. his executors administrators and assigns for and during and unto the full end and term of fourteen years from the —— day of —— A. D. —— next and immediately ensuing according to the statute in such case made and provided And to the end that he the said A. B. his executors administrators and assigns and every of them may have and enjoy the full benefit and the sole use and exercise of the said invention according to our gracious intention hereinbefore declared We do by these presents for us our heirs and successors require and strictly command all and every person and persons bodies politic and corporate and all other our subjects whatsoever of what estate quality degree name or condition soever they be within our United Kingdom of Great Britain and Ireland the Channel Islands and Isle of Man [COLONIES TO BE MENTIONED IF ANY] that neither they nor any of them at any time during the continuance of the said term of fourteen years hereby granted either directly or indirectly do make use or put in practice the said invention or any part of the same so attained unto by the said A. B. as aforesaid nor in anywise counterfeit imitate or resemble the same nor shall make or cause to be made any addition

(*a*) The Colonies should here be mentioned, if any, though it is not so stated in the printed form annexed to the Act.

thereunto or subtraction from the same whereby to pretend himself or themselves the inventor or inventors devisor or devisors thereof without the consent licence or agreement of the said A. B. his executors administrators or assigns in writing under his or their hands and seals first had and obtained in that behalf upon such pains and penalties as can or may be justly inflicted on such offenders for their contempt of this our royal command and further to be answerable to the said A. B. his executors administrators and assigns according to law for his and their damages thereby occasioned And moreover we do by these presents for us our heirs and successors will and command all and singular the justices of the peace mayors sheriffs bailiffs constables headboroughs and all other officers and ministers whatsoever of us our heirs and successors for the time being that they or any of them do not nor shall at any time during the said term hereby granted in anywise molest trouble or hinder the said A. B. his executors administrators or assigns or any of them or his or their deputies servants or agents in or about the due and lawful use or exercise of the aforesaid invention or anything relating thereto PROVIDED ALWAYS and these our letters patent are and shall be upon this condition that if at any time during the said term hereby granted it shall be made appear to us our heirs or successors or any six or more of our or their Privy Council that this our grant is contrary to law or prejudicial or inconvenient to our subjects in general or that the said invention is not a new invention as to the public use and exercise thereof or that the said A. B. is not the true and first inventor thereof within this realm as aforesaid these our letters patent shall forthwith cease determine and be utterly void to all intents and purposes anything herein contained to the contrary thereof in anywise notwithstanding PROVIDED ALSO that these our letters patent or anything herein contained shall not extend or be construed to extend to give privilege unto the said A. B. his executors administrators or assigns or any of them to use or imitate any invention or work whatsoever which hath heretofore been found out or invented by any other of our subjects whatsoever and publicly used or exercised unto whom our like letters patent or privileges have been already granted for the sole use exercise and benefit

thereof it being our will and pleasure that the said A. B. his executors administrators and assigns and all and every other person and persons to whom like letters patent or privileges have been already granted as aforesaid shall distinctly use and practise their several inventions by them invented and found out according to the true intent and meaning of the same respective letters patent and of these presents PROVIDED LIKEWISE nevertheless and these our letters patent are upon this express condition [that if the said A. B. shall not particularly describe and ascertain the nature of his said invention and in what manner the same is to be performed by an instrument in writing under his hand and seal and cause the same to be filed in —— within —— calendar months next and immediately after the date of these our letters patent] [and also if the said instrument in writing filed as aforesaid does not particularly describe and ascertain the nature of the said invention and in what manner the same is to be performed] and also if the said A. B. his executors administrators or assigns shall not pay or cause to be paid at the office of our Commissioners of Patents for Inventions the sums following that is to say the sum of ———— pounds on or before the —— day of —— A.D. —— and the stamp duty payable in respect of the certificate of such payment and the sum of ———— pounds on or before the —— day of —— A.D. —— and the stamp duty payable in respect of the certificate of such payment (*b*) AND ALSO if the said A. B. his executors administrators or assigns shall not supply or cause to be supplied for our service all such articles of the said invention as he or they shall be required to supply by the officers or commissioners administering the department of our service for the use of which the same shall be required in such manner at such times and at and upon such reasonable prices and terms as shall be settled for that purpose by the said officers or commissioners requiring the same that then and in any of the said cases these our letters patent and all liberties and advantages whatsoever hereby granted shall utterly cease determine and become void anything hereinbefore contained to the contrary thereof in anywise notwith-

(*b*) By stat. 16 & 17 Vict. c. 5, no fees are now payable, but stamp duties only. See *ante*, p. 246.

standing PROVIDED THAT nothing herein contained shall prevent the granting of licences in such manner and for such consideration as they may by law be granted AND LASTLY we do by these presents for us our heirs and successors grant unto the said A. B. his executors administrators and assigns that these our letters patent on the filing thereof shall be in and by all things good firm valid sufficient and effectual in the law according to the true intent and meaning thereof and shall be taken construed and adjudged in the most favourable and beneficial sense for the best advantage of the said A. B. his executors administrators and assigns as well in all our Courts of Record as elsewhere and by all and singular the officers and ministers whatsoever of us our heirs and successors in our United Kingdom of Great Britain and Ireland the Channel Islands and the Isle of Man [COLONIES TO BE MENTIONED IF ANY] and amongst all and every the subjects of us our heirs and successors whatsoever and wheresoever notwithstanding the not full and certain describing the nature or quality of the said invention or of the materials thereunto conducing and belonging In witness whereof we have caused these our letters to be made patent this —— day of ——— A.D. —— and to be sealed and bear date as of the said ——— day of ——— A.D. —— in the ——— year of our reign.

APPENDIX (B).

Referred to, pp. 274, 300, 302, 401, 402.

Marriage Settlement of a Share of a Testator's Residuary Personal Estate and of Money in the Funds upon the usual Trusts.

THIS INDENTURE made the —— day of —— 1860 Between Charles Catchpole of King Street in the city of London gentleman of the first part Grace Gurney of Harley Street in the county of Middlesex spinster of the second part and Henry Hunter of Brixton in the county of Surrey Esquire John James of Lincoln's Inn in the county of Middlesex Esquire and Leonard Lambert of Brighton in the county of Sussex Esquire of the third part WHEREAS a marriage has been agreed upon and is intended to be shortly solemnized between the said Charles Catchpole and Grace Gurney AND WHEREAS under and by virtue of the last will and testament of John Gurney late of Harley Street aforesaid Esquire deceased which said will bears date on or about the ninth day of January 1840 and was proved in the Prerogative Court of the Archbishop of Canterbury (*a*) on or about the twelfth day of March 1840 the said Grace Gurney is now entitled to one equal undivided fourth part or share or some other part or share of the residuary personal estate of the said testator or the stocks funds or securities in or upon which the same is or may be invested AND WHEREAS the said Grace Gurney is possessed of the sum of £5000 £3 per cent. consolidated bank annuities which said sum was lately standing in her own name in the books of the governor and company of the Bank of England AND WHEREAS upon the treaty for the said intended marriage it was agreed that the said Grace Gurney should assign the said one equal undivided fourth part or

Recital of intended marriage.

Recital of possession of personalty under a will.

Recital of possession of stock.

Recital of agreement to assign personalty to trustees.

(*a*) See *ante*, p. 346.

share or other part or share to which she is entitled as aforesaid of and in the residuary personal estate of her said late father unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns upon and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same And it was also agreed that the said Grace Gurney should transfer the said sum of £5000 £3 per cent. consolidated bank annuities of which she is possessed as aforesaid into the names of the said Henry Hunter John James and Leonard Lambert to be held by them upon and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same AND WHEREAS the said sum of £5000 £3 per cent. consolidated bank annuities hath been accordingly transferred by the said Grace Gurney out of her name into the names of the said Henry Hunter John James and Leonard Lambert and the same is now standing in their names in the books of the governor and company of the Bank of England as they the said Henry Hunter John James and Leonard Lambert do hereby admit and acknowledge NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement in this behalf and in consideration of the said intended marriage she the said Grace Gurney with the consent and approbation of the said Charles Catchpole testified by his being a party to and executing these presents HATH granted bargained sold assigned and transferred and by these presents DOTH grant bargain sell assign and transfer unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns ALL that the one equal undivided fourth part or share or other part or share of her the said Grace Gurney under the hereinbefore mentioned will of her said late father John Gurney of and in the residuary personal estate of her said late father and of and in the stocks funds and securities in or upon which the same now is or shall or may at any time or times hereafter be invested and of and in the dividends interest and annual produce thereof AND all the right title claim and demand whatsoever at law and in equity of her the said Grace Gurney in and to the said one equal undivided fourth part or share or other part or share hereby assigned TO HAVE HOLD RECEIVE AND TAKE the said

Recital of agreement to transfer stock to trustees.

Recital of transfer of stock accordingly.

Testatum.

Assignment.

Parcels, share of residue.

And all the right, &c.

Habendum.

one equal undivided fourth part or share or other part or share intended to be hereby assigned of and in the residuary personal estate of the said John Gurney and the investments and income thereof unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns IN TRUST for the said Grace Gurney her executors administrators and assigns until the solemnization of the said intended marriage and from and immediately after the solemnization thereof UPON and for the trusts intents and purposes and with under and subject to the powers provisos agreements and declarations hereinafter expressed and declared of and concerning the same AND the said Charles Catchpole and Grace Gurney do and each of them doth hereby irrevocably nominate and appoint the said Henry Hunter John James and Leonard Lambert and the survivors and survivor of them his executors administrators and assigns to be the true and lawful attornies and attorney of them the said Charles Catchpole and Grace Gurney and each of them (*b*) in their his or her names or name to ask recover and receive from the executors of the will of the said John Gurney and all and every persons and person liable to pay or transfer the same the said one equal undivided fourth part or share hereby assigned and to give effectual discharges for the same and on non-payment or non-transfer thereof or of any part thereof to commence carry on and prosecute any action or actions suit or suits or other proceedings whatsoever for obtaining payment or transfer thereof And also for all or any of the said purposes from time to time to substitute or appoint any attorney or attornies under them or him And generally to do and execute all such other matters and things in the premises as shall be necessary they the said Charles Catchpole and Grace Gurney hereby agreeing to allow and confirm whatsoever the said Henry Hunter John James and Leonard Lambert or the survivors or survivor of them his executors administrators or assigns shall lawfully do or cause to be done in the premises by virtue hereof AND it is hereby agreed and declared by and between the said parties hereto that they the said Henry Hunter John James and Leonard Lambert

Trust for lady till marriage.

Power of attorney.

Trust of stock.

(*b*) This power of attorney is not absolutely necessary, as the *choses in action* which are assigned are equitable only; see *ante*, p. 124.

their executors administrators and assigns shall stand possessed of and interested in the said sum of £5000 £3 per cent. consolidated bank annuities so transferred into their names as aforesaid In trust for the said Grace Gurney her executors administrators and assigns until the solemnization of the said intended marriage And from and immediately after the solemnization thereof Upon and for the trusts intents and purposes and with under and subject to the powers provisos agreements and declarations hereinafter expressed and contained of and concerning the same And it is hereby agreed and declared by and between the said parties hereto that from and after the solemnization of the said intended marriage the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns shall stand possessed of and interested in the said one equal fourth part or share or other part or share hereinbefore assigned of and in the residuary personal estate of the said John Gurney and the investments thereof and the said sum of £5000 £3 per cent. consolidated bank annuities Upon trust that the said trustees or the trustees or trustee for the time being of these presents do and shall either continue the same respectively in their respective actual states of investment or do and shall lay out and invest the same in any of the parliamentary stocks or public funds of Great Britain or at interest upon government or real securities in England or Wales but not in stock of the Bank of England or Ireland or in East India Stock or on real securities in Ireland (*c*) and do and shall from time to time alter and vary the said stocks funds and securities for or into others of a like nature as often as the said trustees or trustee shall think fit Provided that every such investment alteration and variation be made with the consent of the said Charles Catchpole and Grace Gurney during their joint lives and after the decease of either of them with the consent of the survivor of them (*d*) and after the decease of such survivor at the discretion of the said trustees or trustee for the time being of these presents And it is hereby agreed and declared by and between the said parties hereto that after the solemnization of the said intended marriage the said trustees or

Trust for intended wife till marriage.

Trust of share of personalty and of stock after marriage.

Trust to continue or vary investments.

With consent.

Declaration of trust of investments.

(*c*) See *ante*, pp. 296, 297. (*d*) See *ante*, pp. 298, 299.

trustee for the time being of these presents shall stand possessed of and interested in the said share of the residuary personal estate of the said John Gurney and the investments thereof and the said sum of £5000 £3 per cent. consolidated bank annuities and the stocks funds and securities in or upon which the same may be invested and the dividends interest and annual produce thereof Upon and for the trusts intents and purposes and under and subject to the powers provisos agreements and declarations hereinafter expressed and declared of and concerning the same that is to say Upon trust that they the said trustees or trustee for the time being of these presents do and shall during the life of the said Grace Gurney pay the interest dividends and annual produce thereof unto such person or persons as the said Grace Gurney shall from time to time notwithstanding her said intended or any future coverture appoint by any writing under her hand but not by any mode of anticipation and in default of such appointment into her own hands for her sole and separate use (*e*) exclusive of the said Charles Catchpole and of any future husband but so that she shall not dispose thereof in any mode of anticipation And the receipts in writing of the said Grace Gurney or of such person or persons as she shall appoint to receive the said dividends interest and annual produce in manner aforesaid but not in any mode of anticipation shall notwithstanding her said intended or any future coverture be effectual discharges for the same And from and immediately after the decease of the said Grace Gurney Upon trust that the said trustees or trustee for the time being of these presents do and shall pay the dividends interest and annual produce of the said trust monies stocks funds and securities unto or permit the same to be received by the said Charles Catchpole and his assigns for and during the term of his natural life And from and immediately after the decease of the survivor of them the said Charles Catchpole and Grace Gurney the said trustees or trustee for the time being of these presents shall stand and be possessed of and interested in the said trust monies stocks funds and securities and the dividends interest and annual produce thereof In trust for all and

Trust for separate use of intended wife for life.

After decease of intended wife, trust for intended husband for life.

After decease of survivor,

(*e*) See *ante*, p. 400.

every or such one or more exclusively of the others or other of the children or child of the said intended marriage with such provision for their respective maintenance and if more than one in such shares and proportions and subject to such limitations and conditions over in favour of any others or other of the said children and in such manner (*f*) as the said Charles Catchpole and Grace Gurney by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by them sealed and delivered in the presence of and to be attested by two or more credible witnesses shall jointly direct or appoint And in default of such joint direction or appointment and so far as any such joint direction or appointment if incomplete shall not extend as the survivor of them the said Charles Catchpole and Grace Gurney by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by him or her respectively sealed and delivered in the presence of and to be attested by two or more credible witnesses or by his or her last will or any codicil or testamentary writing to be by him or her respectively duly executed (and as to the said Grace Gurney notwithstanding any future coverture) shall direct or appoint And in default of such direction or appointment and so far as any such direction or appointment if incomplete shall not extend In trust for all and every the children or child of the said intended marriage who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age with the consent of her or their parent or parents guardian or guardians for the time being and to be divided between or amongst the said children if more than one in equal shares as tenants in common and if there shall be but one such child who being a son shall live to attain the age of twenty-one years or being a daughter shall live to attain that age or marry under that age with such consent as aforesaid then the whole shall be in trust for that one or only child But no child taking any part of the said trust monies stocks funds and securities under any appointment to be made in exercise of

trust for children as intended husband and wife shall jointly appoint.

In default, as survivor shall appoint by deed or will.

In default of appointment,

trust for children equally, sons at twenty-one years, daughters at twenty-one or marriage with consent.

Hotchpot clause.

(*f*) See *ante*, pp. 284, 285.

any of the aforesaid powers shall be entitled to any share of the unappointed part of the said trust monies stocks funds and securities without bringing his or her appointed share into hotchpot and accounting for the same accordingly (*g*)

If no child shall become entitled.

And if there shall be no child or children of the said intended marriage who shall become entitled to the said trust monies stocks funds and securities under the trusts hereinbefore declared then the said trustees or trustee for the time being shall stand possessed of the said trust monies stocks funds and securities or so much thereof as shall not have been disposed of under the powers and authorities herein contained and the dividends interest and annual produce thereof (subject nevertheless to the trusts hereinbefore declared) Upon and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same that is to say If the said Charles Catchpole shall depart this life in the lifetime of the said Grace Gurney In trust for the said Grace Gurney her executors administrators and assigns for her own benefit But if the said Grace Gurney shall depart this life in the lifetime of the said Charles Catchpole then after the decease of the said Charles Catchpole and such failure of children as aforesaid Upon and for such trusts intents and purposes and in such manner as the said Grace Gurney by her last will or any codicil or testamentary writing to be by her duly executed notwithstanding her said intended coverture shall direct or appoint (*h*) And in default of such direction or appointment and so far as any such direction or appointment if incomplete shall not extend In trust for the person or persons who under the statutes made for the distribution of the estates of intestates would at the decease of the said Grace Gurney be entitled to her personal estate in case she had died possessed of the same intestate and without having been married and to be divided between or amongst the same persons if more than one in the shares in which the same would under the same statutes be divided between or amongst them Provided always and it is hereby agreed and declared by and between the said parties hereto that after the decease of the said Charles Catchpole and Grace Gurney

If intended husband shall die first.

Trust for intended wife absolutely.

If intended wife shall die first,

upon such trusts as intended wife shall by will appoint.

In default of appointment,

trust for next of kin of intended wife.

Maintenance and education clause.

(*g*) See *ante*, p. 285. (*h*) See *ante*, p. 282.

and whilst any child or children of the said intended marriage being a son or sons shall be under the age of twenty-one years or being a daughter or daughters shall be under that age and unmarried the said trustees or trustee for the time being of these presents do and shall apply the whole or such part as the said trustees or trustee for the time being shall think fit of the dividends interest and annual produce of the expectant or presumptive share of each such child in the said trust monies stocks funds and securities for or towards his or her maintenance and education or otherwise for his or her benefit and that the said trustees or trustee for the time being may either themselves or himself so apply the same or may pay the same to the guardian or guardians of such child for the purpose aforesaid without seeing to the application thereof (*i*) And do and shall lay out and invest the surplus if any of the said interest dividends and annual produce in the names or name of the said trustees or trustee for the time being in any of the stocks funds or securities hereinbefore mentioned to be from time to time altered and varied for or into any other stocks funds and securities of a like nature as often as the said trustees or trustee shall think fit so that the same may accumulate by way of compound interest and the accumulations to be so made shall be added to the fund or respective funds from which the same shall have proceeded and be subject to the same trusts and provisions in every respect and so that the dividends interest and annual produce of each such accumulated fund may be subject to the provision hereinbefore contained for the maintenance and education at any subsequent period of minority of the child from whose expectant or presumptive share the same shall have proceeded Provided also and it is hereby agreed and declared that it shall be lawful for the said trustees or trustee for the time being of these presents during the joint lives of the said Charles Catchpole and Grace Gurney with their consent in writing and after the decease of either of them with the consent in writing of the survivor of them, which consent shall be binding whether the said Grace Gurney shall be covert or sole and after the decease of such survivor at the discretion

Accumulation clause.

Power of advancement.

(*i*) See *ante*, pp. 291—294.

of the said trustees or trustee for the time being to raise and apply a sufficient part of the expectant share of any child of the said intended marriage in the said trust monies stocks funds and securities for or towards his or her advancement in the world, notwithstanding he or she shall not then have attained the age of twenty-one years or after he or she may have attained that age in the lifetime of the said Charles Catchpole and Grace Gurney or the survivor of them PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that it shall be lawful for the said trustees or trustee for the time being at any time or times during the lives or life of the said Charles Catchpole and Grace Gurney or the survivor of them with their his or her consent and approbation in writing signed with their his or her hands or hand to convert into money the whole or any part of the said stocks funds and securities and to lay out the monies arising thereby in the purchase of any freehold or copyhold estates in England or Wales of an estate of inheritance in fee simple in possession free from all incumbrances except quit rents and copyhold and customary dues and services (*k*) to be conveyed or surrendered to the said trustees or trustee for the time being their or his heirs and assigns UPON TRUST nevertheless with the consent and approbation of the said Charles Catchpole and Grace Gurney or the survivor of them to be signified by writing signed with their his or her hands or hand during the lifetime of them or the survivor of them and after the decease of the survivor of them then at the discretion and of the proper authority of the said trustees or trustee for the time being of these presents to sell and dispose of the said estates which shall have been so purchased as aforesaid either by public auction or private contract in one lot or in parcels subject to such special conditions of sale and for such price or prices as to the said trustees or trustee for the time being shall seem reasonable with power at any public auction of the said premises or any of them to buy in the same or any of them and also to vary or rescind any contract for the sale of the same or any part thereof and to resell the same in manner

Power to invest in the purchase of lands.

Trust for sale of lands to be purchased.

(*k*) See *ante*, p. 299.

aforesaid without responsibility for any loss to be occasioned thereby and to convey and assure the said premises which shall be sold to the purchaser or respective purchasers thereof or as he she or they respectively shall direct AND UPON TRUST to apply the monies arising from such sale after payment of the costs charges and expenses attending the same Upon and for such and the same trusts intents and purposes as the monies so raised and laid out in the purchase of such estates were subject to before such purchase was made or would have been subject to if the same had not been laid out therein AND ALSO UPON TRUST in the meantime and until such estates shall be so resold to apply the rents and profits thereof in such manner as the interest dividends and annual produce of the monies laid out in the purchase thereof would have been applicable under the trusts hereinbefore declared in case such purchase had not been made IT BEING hereby agreed and declared that the estates to be purchased under this present power as aforesaid shall when so purchased be considered as money and be subject to such and the same trusts in all respects as the monies laid out in the purchase thereof were subject to before such purchase was made or would have been subject to if the same had not been laid out therein PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that it shall be lawful for the trustees or trustee for the time being of the estates so to be purchased by virtue of such power as aforesaid with the consent and approbation of the said Charles Catchpole and Grace Gurney or the survivor of them testified by some writing under their his or her hands or hand and after the decease of such survivor then at the discretion and of the proper authority of the said trustees or trustee by deed at any time or times to demise and lease the same estates or any of them or any part thereof to any person or persons whomsoever for any term of years not exceeding twenty-one years to take effect in possession and not by way of future interest at the best yearly rent that can be had or gotten for the same and without any fine or foregift for the making thereof and upon such other terms and conditions as the said trustees or trustee shall think fair and reasonable PROVIDED ALWAYS and it is hereby agreed and declared by and between

Trust of sale monies the same as monies laid out.

Purchased estates to be considered as money.

Power of leasing estates to be purchased.

Power for trustees to settle

with executors as to share of residue; the said parties hereto that it shall be lawful for the trustees or trustee for the time being of these presents with the consent in writing of the said Charles Catchpole and Grace Gurney during their joint lives and after the decease of either of them with the consent in writing of the survivor of them and after the decease of such survivor at the discretion of the said trustees or trustee to settle and ascertain in such manner as they or he shall deem expedient the amount of any monies properties or effects due to or claimed by them or him under these presents by virtue of the will of the said John Gurney

and to pass their accounts. deceased and also to pass and allow the accounts of the person or persons paying over or transferring the same monies properties or effects or any part thereof and to accept any monies properties or effects which the said trustees or trustee for the time being with such consent or at such discretion as aforesaid shall deem it expedient to accept in lieu of or satisfaction for the whole of the said premises hereby assigned and to give releases and discharges to the accounting party or parties for the same premises or any part thereof as fully and effectually as the trustees or trustee for the time being of these presents might or could do if they or he were absolute

Power to refer to arbitration. and beneficial owners or owner of such premises And if any disputes or difficulties shall at any time arise in relation to the said premises hereby assigned or any part thereof it shall be lawful for the trustees or trustee for the time being of these presents if they or he shall think proper with such consent or at such discretion as aforesaid to refer any such disputes or difficulties to arbitration in the usual manner or otherwise to settle and adjust the same in such manner in all respects as the said trustees or trustee for the time being with such consent or at such discretion as aforesaid shall

Power for trustees to postpone and forbear exercise and enforcement of powers and remedies. think proper Provided also and it is hereby further agreed that it shall be lawful for the trustees or trustee for the time being of these presents in their or his discretion to postpone or forbear the exercise and enforcement of all or any of the powers and remedies hereby vested in or which shall or may be exercisable by such trustees or trustee by virtue hereof anything herein contained or any rule at law or equity to the

Receipt clause. contrary notwithstanding Provided also and it is hereby agreed and declared by and between the said parties hereto

that the receipts in writing of the trustees or trustee for the time being acting in the execution of the trusts or powers of these presents for any monies payable to them or him by virtue of these presents shall effectually discharge the person or persons paying the same from all responsibility as to the misapplication or nonapplication thereof and from all obligation of seeing to the application thereof (*l*) AND ALSO that it shall be lawful for the trustees or trustee for the time being of these presents but during the lives of the said Charles Catchpole and Grace Gurney and the life of the survivor of them with their his or her consent in writing to accept other real securities for any part of the said trust funds which may be invested in real securities and the interest thereof in lieu of and as a substitution for the hereditaments or any part of the hereditaments comprised in any such security AND ALSO to discharge from any such security any part or parts of the hereditaments therein comprised and without which the said trustees or trustee shall deem the existing security or securities sufficient and every such acceptance of a new security and every release of all or any part of the hereditaments comprised in the existing securities shall be binding on all persons interested in the said trust funds and the interest thereof and the persons deriving title to the hereditaments so released shall not be obliged to inquire into the sufficiency in point of value or title of the substituted or retained security or securities PROVIDED ALSO and it is hereby further agreed and declared by and between the said parties hereto that if the said trustees hereinbefore appointed or any or either of them or any future trustee or trustees to be appointed as hereinafter is mentioned shall happen to die or shall go to reside beyond the seas or shall be desirous of being discharged or shall decline or become incapable to act in the trusts or powers herein contained before the same shall be fully performed or otherwise satisfied then and in every such case it shall be lawful for the said Charles Catchpole and Grace Gurney during their joint lives and after the decease of either of them for the survivor of them and after the decease of such survivor for the surviving or continuing trustees or

Power to accept other securities.

And to discharge part of the hereditaments comprised in any security.

Power to appoint new trustees.

(*l*) See *ante*, p. 301.

trustee for the time being of these presents or the acting executors or administrators of the last surviving or continuing trustee (and for this purpose a retiring trustee shall if willing to act in the execution of this power be considered a continuing trustee) by any deed or deeds instrument or instruments in writing to be by them him or her sealed and delivered in the presence of and to be attested by two or more credible witnesses to substitute and appoint any other person or persons to be a trustee or trustees in lieu of the trustee or trustees so dying going to reside beyond the seas desiring to be discharged declining or becoming incapable to act as aforesaid (*m*) And that when any new trustee or trustees shall have been appointed as aforesaid all the said trust estates monies and premises which shall be then vested in the trustees or trustee for the time being of these presents or in the heirs executors or administrators of the last surviving or continuing trustee shall with all convenient speed be conveyed assigned transferred and paid so as effectually to vest the same in the surviving or continuing trustees or trustee and such new or other trustee or trustees or if there shall be no surviving or continuing trustee then in such new trustees or trustee only upon the same trusts as are hereinbefore declared concerning the same or such of the same trusts as shall be subsisting or capable of taking effect And it is hereby agreed and declared that every such new trustee shall in all things act and assist in the management and execution of the trusts and powers to which he shall be so appointed as effectually and with the same powers authorities exemptions and discretion as if he had been originally by these presents nominated a trustee for the purposes aforesaid In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

(*m*) See *ante*, p. 302.

INDEX.

A.

ABILITY, representation as to, 89, 426.
ABSCONDING Debtors Act, 1870..146.
ABSENCE beyond the seas, saving of disability of, 419.
ABSTRACT of title, 427.
ACCEPTANCE of goods, what is, 40.
of offer, 87.
ACCEPTOR of a bill, liability of, 91.
ACCUMULATION, restraint on, 281.
ACKNOWLEDGMENT, remarks on, by wife, of the conveyance of her real estate, 410.
ACT of bankruptcy, what is, 119, 130, 131, 141, 142, 143, 144, 145.
bonâ fide transactions valid notwithstanding, 158.
See also BANKRUPTCY.
ACTION, chose in, 4, 5, 6, 67, 124, 319, 388, 390, 392.—See also CHOSE IN ACTION.
ACTIONS, real, personal and mixed, 3.
ex delicto and *ex contractu*, 67, 68.
personal, 3, 69.
for dilapidations, 71, 72.
of detinue, 3.
of trover and conversion, 23, 45, 51.
of replevin, 3.
of debt, 5, 75.
by married woman, 390.
of debt by husband for arrears of wife's rent, 392.
limitation of, 417—421.
ADEMPTION of specific legacy, 358.
ADJUDICATION of bankruptcy, 148.
ADMINISTRATION, stamp on letters of, 372.
exemptions from, 373.
limited, 371.
husband's right to, of his wife's effects, 391.
ADMINISTRATOR *durante minore ætate*, 342, 371.
who appointed, 368.
joint, 369.

ADMINISTRATOR, rights and powers of, 370.
his year, *ib.*
durante absentiâ, 371.
pendente lite, *ib.*
cum testamento annexo, 372.
office of, not transmissible, 373.
de bonis non, *ib.*
not bound to plead the Statute of Limitations, 422.
of convict's property, 49.
ADMIRALTY, high court of, 64, 103.
jurisdiction of county courts, 64.
ADMISSION of debt, 144.
ADVANCEMENT to children, to be accounted for in distribution, 374.
form of power of, in a settlement, 443.
AFFIDAVIT of debt, filing an, 144.
AFTER-acquired property of bankrupt, 166.
AGENTS, 415.
AGREEMENTS which are required to be in writing, 39, 42, 83.
See also CONTRACTS.
stamp on, 84, n.
by letter, 87.
bonds for performance of, 116.
ALIEN, 46, 59.
may be bankrupt, 140.
ALIENATION of choses in possession, 33, 36.
void, 46.
involuntary, 53, 125.
on bankruptcy, 55.
of choses in action, 124, 125, 208, 385, 395.
growth of right of testamentary, 334.
See also ASSIGNMENT.
ALIMONY, 407.
ALLOWANCE of bankrupt, 156.
ALTERATION of a deed, 94, 94, n.
ANIMALS *feræ naturæ*, 19.
ANNUITIES, Bank.—See STOCK IN THE FUNDS.
ANNUITY, apportionment of, 275.
apportionable if given for maintenance, 276.
legacy duty on, 357.
warrant of attorney to secure, 107.
personal, 207.
perpetual annuity is personal estate, 211.
ANTICIPATION, restraint on, 401.
APPOINTMENT of portions, 284.
illusory, *ib.*
exclusive, *ib.*
voluntary, 282.

APPOINTMENT, none to executors or administrators of deceased objects, 285.
amongst a class, 286.
to issue of a child, when good, 287.
fraudulent by a father, 288.
creating a perpetuity, *ib.*
of new trustees, 302, 305.
by wife in favour of her husband, 402.
powers of, 284, 286, 287, 350.
given to wife, 402.
form of power of, amongst children, 441.
form of power of, by wife, 442.
APPORTIONMENT of income, 274.
Apportionment Act, 1870..276.
meaning of "dividends," 277.
ARBITRATION, 191, 446.
in bankruptcy, 151.
jurisdiction of the courts in matters referred to, 191.
act for determining differences by, 193.
every submission may be made a rule of court, 194.
revocation of submission to, *ib.*
death of parties, 196.
ARBITRATOR may state special case, 201.
on failure of parties, judge may appoint, 195, 203.
death of, 197.
appointment of, *ib.*
two may appoint umpire, 203.
ARRANGEMENTS by deed between a debtor and his creditors, 128, 131.
regulations as to, 169.
under control of court of bankruptcy, 132, 135.
ARREARS of rent, 112.
of rent, limitation of actions for, 418.
action by husband for, of rent of wife's estate, 392.
of interest on bond, 114.
of interest, limitation of actions for, 420.
of dower, 419.
ARREST on mesne process, 111.
ARTICLES of association, 232.
quæ ipso usu consumuntur, 273.
ASSENT of executor, 341.
ASSETS, executor not liable beyond amount of, 355.
ASSIGNEES of bankrupt, 56, 126, 148.
title of, 157.
official, 148.
of insolvent, 175.
ASSIGNMENT of choses in possession, 33, 35.
of choses in action, 124, 208, 395.

ASSIGNMENT of choses in action, notice of, 125, 424.
of breaches, 116.
of policies of life insurance, 124, 186, 187, 427.
of marine policies, 124.
of letters patent, 254.
of copyright, 259.
in trust for creditors, 130, 142.
of wife's reversionary choses in action, 395.
inquiry as to prior, of chose in action, 425.
a person may assign to himself, 428.
of choses in action, form of an, 437.
ASSOCIATION, memorandum of, 230, 231.
articles of, 232.
ASSUMPSIT, 77.
ATTORNEY, contract by attorney and solicitor, 101.
Attornies and Solicitors Act, 1870, *ib.*
warrant of, 105.
execution and attestation of warrant of, 107.
warrant of, formerly executed by insolvent debtor, 178.
power of, on assigning a legal chose in action, 124.
power of, construed strictly, 415.
form of a power of, 438.
not liable as a trader to the bankrupt laws, 140.
AUCTION, sale by, 42.
AWARD, 197.
time of making, *ib.*
enlargement of time of making, *ib.*
attendance of parties, 199.
mode of proceeding, *ib.*
must be certain and final, *ib.*
setting aside, 201.
effect of, 205.
performance of, *ib.*
for payment of money creates a debt, 205.
under seal not a deed, 206.
stamp on, *ib.*
limitation of actions on, 421.

B.

BAILEE, possession of, 26, 36, 41.
BAILMENT, 25.
BANK annuities.—See STOCK IN THE FUNDS.
notes, title to, 412.
BANKER'S protection as to presented draft, 91.
BANKING companies, 223.
act for incorporation of, 226.

BANKING companies, sale of shares, 240.
BANKRUPTCY of joint stock companies, 227.
of trustee, 305.
of a trading partnership, 326.
of joint creditors, 321.
registration of deed of composition, 130, 131.
fiat, 147.
goods in bankrupt's possession, order or disposition, 56.
choses in action in bankrupt's possession, order and disposition, 56, 160, 425.
former revival of debt barred by, 81.
court of, 103, 147.
assignees, 126, 148.
does not determine a submission to arbitration, 196.
voluntary settlement void in event of, 161, 311.
preference, 176.
Act, 1869..56, 158.
who may be bankrupt, 139.
act of bankruptcy, 119, 130, 131, 141, 142.
petition for adjudication, 146.
adjudication, 148.
advertisement of order of, *ib.*
trustee, 127, 149.
appointment of, 149.
how trustee sues for debt, 127, 319.
committee of inspection, 149, 151.
exercise of powers by trustee, 150, 283.
management of property by bankrupt, 151.
powers of trustee with sanction of committee, *ib.*
to accept composition or general scheme of arrangement, 152.
trustee, if a solicitor, may be paid for services, *ib.*
proceeds of sale and seizure of goods, 153.
proof of debts, 153, 154.
what are considered debts, 154.
estimate of contingent liabilities, *ib.*
definition of "liability," 155.
power of landlord to distrain for one year's rent, *ib.*
proof in case of rent, *ib.*
interest on debts, 156.
proof in respect of distinct contracts, *ib.*
allowance to bankrupt, *ib.*
set-off, *ib.*
secured creditor, provision as to, 145, 157.
title of trustee relates back to time of act of bankruptcy, 55, 157, 158, 170, n.
protection of certain transactions with bankrupt, 159.

BANKRUPTCY, voluntary settlements, avoidance of, 161.
covenant for future settlement, avoidance of, *ib.*
fraudulent preferences, avoidance of, 161, 162, n.
debts paid ratcably in, 162.
bankrupt entitled to surplus, 163.
certificate, *ib.*
order of discharge, 164, 177, 321.
effect of, 165, 178.
exception of joint debtors, 166.
uncertificated bankrupt, rights and status of, 166, 167.
evidence of proceedings in, 148, 168.
gazette, 148.
privilege of parliament not to prevent adjudication, 168.
vacating seat in House of Commons, *ib.*
bankrupt peers, 182.
liquidation by arrangement, regulations as to, 169.
bankruptcy of non-traders, 174.
1 & 2 Vict. c. 110..*ib.*
5 & 6 Vict. c. 116..178.
24 & 25 Vict. c. 134; 32 & 33 Vict. c. 71..129, 180, 181, 182.
pauper and lunatic prisoners, 180.
half-pay, &c., *ib.*
pay of officers, 181.
sequestration of ecclesiastical benefice, 176, 180, 181.
salary, 182.
BARNARD'S Act, now repealed, 212, 240.
BASTARD, gift by will to, 363.
BENEFICE, charge by clergymen on, void, 98.
right of nomination to, does not pass to trustee in bankruptcy, 283.
sequestration of, in bankruptcy, 176, 180, 181.
BEQUEST of stock in the funds, 217.
executory, 271.
general, operates as an exercise of a general power, 283.
to charities, 361.
to illegitimate children, 363.
to joint tenants, 364.
to tenants in common, *ib.*
to a class, *ib.*
BILLS of exchange, 89, 117, 125, 137.
what, prohibited, 90.
indorsement of, 90, 91.
liability of drawer and acceptor, 91.
of indorser, *ib.*
banker's protection, *ib.*
protest of, *ib.*

BILLS of exchange, consideration presumed, 92.
days of grace, 93.
stamp duty, 93, n.
have no preference over other simple contract debts, 117.
always carry interest, 120.
assignment of, 125.
title to, 412.
of lading, 36, 65.
of sale, registration of, 51.
renewal of registration of, 52.
BONA notabilia, 346, 350.
BOND, 113.
to induce cohabitation, void, 95.
for past cohabitation, good, *ib.*
single bond, 114.
with condition, *ib.*
stamp on, 115, n.
joint, 317, 323.
joint and several, *ib.*
for performance of agreements, 116.
interest of money secured by, 114.
limitation of actions on, 116, 418.
voluntary, 117.
BONUS, 274.
BOTTOMRY, 190.
BREACHES, assignment of, 116.
BRITISH possessions abroad, copyright in, 264.
ships, 58, 59.
BROTHERS, right of, under Statute of Distributions, 374.
BUILDING societies, 242.
mortgages to, *ib.*

C.

CAPIAS ad satisfaciendum, writ of, 109, 143.
CASTS, copyright in, 262.
CERTIFICATE of ship's registry, 60.
bankrupt's, 163.
of mortgage and sale of ships, 64.
of shares or stock, 234.
CHAMPERTY, 98.
CHANCERY, Court of, investments of, 209, 210.
order of, restraining transfer, 423.
CHARACTER, representations as to, 88.
CHARITIES, bequest to, 361.

CHARTER party, 64, 65, n.
CHARTER, companies incorporated by, 219.
CHATTELS which descend to the heir, 9.
personal, 2.
of wife belong to her husband, 387.
real, 1.
vegetable, 16.
sale of, in market overt, 413.
CHILDREN, appointments to, 284, 286, 287.
younger, 286.
in ventre, 287, 289.
vesting of portions of, 290.
maintenance of, 291, 292, 293, 294, 399, 408.
form of power of maintenance of, in a settlement, 442.
covenant to settle property on, 309, 310.
gifts to illegitimate, 363.
gifts to, 356, 365.
shares of, under Statute of Distribution, 374.
custody of infant, 404, 405, 408.
order to settle property on, 408.
form of powers of appointment amongst, 441.
form of trusts for, *ib.*
CHOSE in action, 4, 5, 6, 67, 318, 391, 392.
assignment of legal, 124.
assignment of equitable, *ib.*
right of husband to wife's legal, 391.
right of husband to wife's equitable, 392.
Statutes of Limitations as to, 417.
notice of assignment of, 424.
in possession, 4, 9, 318.
alienation of, 33, 36, 53.
title to, 413.
Statutes of Limitation as to, 417.
CIVIL law, subjection of the law of property to, 1.
age at which a will may be made by the, 335.
degrees of kindred traced according to the, 375.
rules of the, as to restraint of marriage, 382.
CIVIL service, probate of will in, 351.
CLASS, appointment amongst a, 286.
bequest to a, 364.
CLAUSES Consolidation Acts, 219, 221.
CLERGYMAN, insolvent, 176.
bankrupt, 180, 181.
action for dilapidations, 72, 73.
waste by, 73.
COAT armour, 13.
CO-DEBTOR, payment by, 324.

COGNOVIT, 105.
execution and attestation of, 107.
to be filed within twenty-one days, 108.
COHABITATION, bond to induce, void, 95.
bond for past, good, *ib.*
COLONIAL shipping, 58, n.
COLONIES, patent for, 253.
copyright in, 260.
COMMISSION of bankruptcy, 147.
COMMITTEE of inspection in bankruptcy, 149, 151, 172.
of lunatic entitled to stock, 214.
COMMITTEEMAN, liability of provisional, 333.
COMMON Law Procedure Acts, 1854 and 1860. . 126.—And see STATUTES.
COMPANIES Clauses Acts, 219, 221.
joint stock, 219.—See JOINT STOCK COMPANIES.
COMPARISON of title to real and personal estate, 428.
COMPOSITION with creditors, 128, 132, 152.
regulations as to, 135.
CONSENT to change of investments, 299.
forfeiture on marriage without, 383.
CONSIDERATION necessary to a contract, 78.
executed, *ib.*
illegal, *ib.*
valuable, 79, 80.
legacy for, 359.
good, 79.
need not always be in writing to form a written contract, 84.
why presumed to a note, 89.
CONSOLS, 209.—See STOCK IN THE FUNDS.
CONTINGENT liabilities, proof of, in bankruptcy, 154.
remainders, none in personal estate, 280.
CONTRACTS, 75.
by deed, 93.
when writing required to, 37, 39, 41, 81, 82, 83, 84, 85.
definition of, 77.
parol, *ib.*
special, *ib.*
valuable consideration necessary to, 78.
with unlawful object, 94, 95.
where some objects lawful and others unlawful, 96, 96, n.
with lawful object, 101.
by way of gaming, void, 99.
for restraint of trade, 97.
usurious, 100.
by attornies and solicitors, 101.
for sale of goods, 37.

CONTRIBUTORIES, 238.
CONVERSION, 23, 45, 51.
of money into land or land into money, 301.
CONVEYANCE.—See ALIENATION.
CONVEYANCER, certificated, has no general lien, 31.
CONVICTS, 48.
administration of convict's property, 49.
interim curator, *ib.*
COPYHOLD estates, limitation of actions for fines for, 421.
COPYRIGHT, 256.
in encyclopædias, reviews, &c., 257.
in dramatic and musical compositions, 258.
foreigner entitled to, *ib.*
registry of proprietors, *ib.*
assignment of, 259.
personal property, *ib.*
foreign reprints of books, 260.
in prints, maps, &c., 261.
in sculptures, 262.
paintings, drawings and photographs, 263.
international, *ib.*
newspapers, 265.
in designs, 266.
CORPORATIONS, 218.
COSTS of writ of mandamus, 68.
of trustees, 305.
CO-SURETIES, 122.
COUNTY Courts, 103.
equitable jurisdiction, extent of, 6.
admiralty jurisdiction, 64.
registry of judgments in, 111.
bankruptcy jurisdiction, 147.
winding-up in, 238.
trustee jurisdiction, 308.
probate jurisdiction of, 349.
COURT for Divorce and Matrimonial Causes, 406.
dissolution of marriage, 406, 408.
protection of wife deserted by husband, 406.
alimony, 407.
judicial separation, *ib.*
wife a feme sole, *ib.*
custody, maintenance, &c. of children, 404, 405, 408.
settlement on judicial separation, 408.
COURTS of record, 103.
COVENANT, 113.
limitation of actions on, 116.

COVENANT, to insure against fire, 188, 189.
voluntary covenants, 117.
for settlement of wife's future property, 309.
to settle husband's property, 310.
joint, 317, 321.
joint and several, 317, 323.
not to sue one joint and several debtor, 324.
for title, 427.
CREDITORS, gifts for defrauding, 50, 311.
remedies of judgment, 109.
composition with, 128, 133, 135, 152.
assignment in trust for, 127, 130.
petitioning on bankruptcy, 146.
proof by secured, in bankruptcy, 157.
assignees of, in bankruptcy, 147.
interest of, in life of debtor, 184.
voluntary settlement void as against, 161, 162, 311.
trust for payment of, when revocable, 313.
may by custom take out administration, 369.
Statutes of Limitation not affected by death of, 421.
CROPS, 17.
CROWN debts, 104, 117.
in bankruptcy, 162, 165.
jewels, 13.
CROWN, right of, to intestate's estates if no next of kin, 377.
CURATOR of convict's property, 49.
CUSTOMS of London and York, 334, 346, 377.
of Wales, 334, 377.
of trades, 416.

D.

DAMAGES, actions which sound in, 75.
liquidated, 76.
limitation of actions for, 421.
DEATH, actions by executors in case of, 69, 70, 71.
of creditor, effect of, 421.
of debtor, effect of, *ib.*
DEBENTURE stock, investments in, 298.
DE BONIS NON, administration, 373.
DEBT, action of, 5, 75.
by husband for arrears of wife's rents, 392.
DEBTS, how assignable, 124.
barred by bankruptcy, 81.
barred by Statute of Limitations, revival of, 82, 420.
incurred during infancy, 82, 88.

DEBTS, involuntary alienation for payment of, 53.
involuntary alienation of, 124, 125.
of record, 103, 112.
crown, 104, 117, 162, 165.
judgment, 104, 108, 117, 162.
abolition of imprisonment for debt, 110.
the Debtors Act, 1869, provisions of, *ib.*
charge on stock of judgment, 215, 244.
specialty, 104, 112, 117.
abolition of priority of specialty debts, 104, 113, 119.
simple contracts, 104, 116, 121.
interest on, 120.
interest on, in bankruptcy, 156.
when taken in execution, 125.
payment of, 127.
appropriation of payments, *ib.*
filing an affidavit of debt, 144.
admission of, *ib.*
proof of, in bankruptcy, 153, 154, 169.
set-off of mutual, in bankruptcy, 156.
all debts in bankruptcy paid rateably, 162.
joint and several, of bankrupt trading partnership, 326.
voluntary, when exempt from probate duty, 352.
payment of, by executor, *ib.*
power of executor to compound, 353.
satisfaction of, by legacies, 359.
payment of, by administrator, 370.
husband's liability to wife's, 397.
covenant to indemnify husband against wife's, 403.
limitation of actions for, 420.
charge of real estate for payment of, 422.
notice to debtor on assignment of, 125, 424.
DEBTOR, notice to, on assigning the debt, 125, 424.
release of, 133.
unreasonable stipulations, 134.
reasonable stipulations, *ib.*
bankruptcy of.—See BANKRUPTCY.
insolvent.—See INSOLVENT DEBTORS.
Absconding Debtors Act, 1870..146.
appointment of executor, 343.
effect of death of, 421.
joint, in bankruptcy, 166.
joint, beyond seas, 322.
and creditor, defects in the law of, 117.
DEBTORS Act, 1869, provisions and exceptions, 110.
DECEASE of person giving power of attorney, 415.
DECLARATION of insolvency, 153.

DECREE of a court of equity, 109.
DEED, title deeds pass by conveyance of the lands, 9.
tenant for life entitled to a possession of the deeds, 10.
alienation by, 37.
contracts by, 93.
alteration or rasure of a, 94.
immaterial alterations, 94, n.
solicitor's lien on, 30.
boxes, 13.
of arrangement, 131.
on assignment of patent, 254.
stamp duty on, 133.
DEER, 19.
DEFEAZANCE to warrant of attorney, 105.
DEGREES of kindred, how traced, 375.
DELIVERY, alienation of personal chattels by, 34.
constructive, 36, 41.
order, 36, 412.
DEMONSTRATIVE legacy, 358.
DENIZEN may be bankrupt, 140.
DESCENT, remarks on law of, 378.
to distant heirs and kindred, 380.
DESIGNS of articles of manufacture, copyright in, 266.
DETINUE, action of, 3.
limitation of action of, 417.
DILAPIDATIONS, 71, 72, 73, 74, 120.
DIRECTORS of joint stock companies, powers of, 332.
notice to, *ib.*
DISABILITIES, savings of, 417, 419, 420.
DISCLAIMER of title or specification of invention, 251.
DISHONOUR of bill or note, notice of, 92.
DISSOLUTION of marriage, 406, 408.
DISTANT heirs and kindred, remarks on descent to, 380.
DISTRESS for rent, 32.
by husband for arrears of wife's rent, 392.
DISTRIBUTION, Statutes of, 366, 373.
remarks on the law, 378.
DISTRINGAS, 426.
on stock, 214.
DIVIDENDS, apportionment of, 276.
unclaimed, of stock in the funds, 423.
DIVORCE, Court for, 406.—See also COURT FOR DIVORCE.
DOCK warrants, 36.
DOMICILE, 338.
DONATIO *mortis causâ*, 340.
DORMANT partner, liability of, 325, 327.
DOWER, legacy in lieu of, 359.

DOWER, limitation of actions for arrears of, 419.
DRAMATIC pieces, copyright in, 258.
DRAWEE of a bill, 89.
DRAWER of a bill, *ib.*
liability of, 91.
DRAWINGS, copyright in, 263.
DURANTE *absentiâ*, administrator, 371.
minore ætate, administrator, 342, 371.
DWELLINGS Act, Labourers', 1855..343.

E.

EAST India Stock, what is, 297.
government notes, 349.
ECCLESIASTICAL benefice, sequestration of, 176, 180, 181.
Dilapidations Act, 1871..72, 120.
EDUCATION of children, provisions for, 291, 292, 408.
form of power of, in a settlement, 442.
EJECTMENT, by one executor, 343, n.
ELECTION that lands should not be sold, 301.
ELEGIT, writ of, 54.
EMBLEMENTS, 17.
ENCYCLOPÆDIAS, copyright in, 257.
ENGRAVINGS, copyright in, 261.
EQUITABLE chose in action, 6, 392.
EQUITY, decree of Court of, 109.
life interest in, 272.
considers as done what is agreed to be done, 300.
of wife to a settlement, 392.
ERASURE, 94.
ESCAPE, limitation of action for, 421.
ESTATES, none in personal property, 7, 278.
EVIDENCE of proceedings in bankruptcy, 148, 168.
required on probate, 347.
EXCHEQUER bills, 295, 298.
EXCLUSIVE appointment, 284.
EXECUTION in case of bankruptcy, 172.
sale of goods, how affected by, 413.
EXECUTOR, actions by, for injury to estate of deceased, 69.
actions against, for wrong done by deceased, 71.
liability of, carrying on trade, 328.
appointment of, 341.
assent of, *ib.*
of executor, 342.
appointment of debtor, 343.
survivorship of office of, *ib.*
renunciation by one, in the lifetime of another, *ib.*

EXECUTOR, rights of, cease on renunciation, 344.
or on death before probate, *ib.*
de son tort, *ib.*
acts of, before probate, 345.
power of, 352, 353.
purchase from, 352.
accounts, 353.
his year, 354.
liability of, 354, 355.
his former right to the residue, 365.
now trustee for the next of kin, 366.
EXECUTORS, any one, may perform acts of administration, 343.
all must join in bringing actions, *ib.*
as to ejectment, 343, n.
administrators and assigns, use of the words as words of limitation, 279.
of objects of a power cannot take under an appointment, 286.
protection to, 354.
not bound to plead the Statute of Limitations, 422.
EXECUTORY bequests, 271.
interests in personal estate, 281.
EXECUTRIX, married woman, 342.

F.

FACTORS, 415.
FARM buildings, 15.
FATHER, appointments by, must not be for his own benefit, 288.
bound to maintain his children, 293.
right of, under Statute of Distributions, 374.
FELONY, forfeiture on conviction of, now abolished, 49.
FEME covert, 386.—See MARRIED WOMAN, and WIFE.
FERÆ *naturæ*, animals, 19.
FIAT in bankruptcy, 147.—See BANKRUPTCY.
FIERI *facias*, writ of, 53.
securities which can be taken under, 125.
limitation of action for money levied under, 421.
FINES for copyhold estates, limitations of actions for, 421.
FIRE insurance, 188, 189.
FISH, 19.
FIXTURES, 13, 52.
trade, 14.
agricultural, 15.
when demised, 16.
FOREIGN judgment, 109.
inventions, 249.

FORFEITURE of goods, 48.
for treason or felony abolished, 49.
on marriage without consent, 383.
for non-insurance, relief against, 189.
FRANCE, convention with, as to copyright, 265.
FRAUD on a power, 288.
FRAUDS, Statute of.—See STATUTE 29 CAR. II. c. 3.
FRAUDULENT conveyance, an act of bankruptcy, 142.
debtors, punishment of, 111.
preference, 161.
FREEHOLD land societies, 243.
FREIGHT, 29, 65.
right of mortgagee to, 66.
FRIENDLY societies, 240.
FRUIT, 18.
FUNDS, the.—See STOCK IN THE FUNDS.
FUTURE property, covenants to settle, 161, 309, 310.

G.

GAME, 19, 20, 21.
GAMING, 99.
GARNISHEE, 126.
GAZETTE, evidence of bankruptcy, 148.
GENERAL lien, 29.
ship, 65.
legacy, 358.
GIFT and delivery, 34.
for defrauding creditors, 50.
of personal estate, 270, 272, 273, 278.
to children, 356, 365.
to illegitimate children, 363.
lapse of, 364.
for "sole use" of wife, 400.
GOODS, property in, 22.
constructive delivery of, 36.
sale of, 37, 39, 87, 413.
what is an acceptance of, 40.
forfeiture of, 48, 49.
mortgage of, 51.
gift of, for life, in law, 271.
in equity, 273.
stolen, 413.
limitation of actions for, 417.
GOODWILL, 268.
GOVERNMENT securities, what are, 295.
GRANT of goods, 33.
GUARDIANS, effect of concurrence of, in settlements, 384.

H.

HALF blood, claim in distribution equally with the whole, 375, 377.
HAWKS, 20.
HEIR looms, 12, 13.
HEIR, specialty debts in which he is bound, 112.
HEIRS, word inapplicable to personal estate, 278.
remarks on descent to distant, 380.
HIRE of goods, 27.
HOLDER of a bill or note, 92.
HORSES, sale of stolen, 414.
HOTCHPOT, clause of, in settlements, 285.
advancements to be brought into, on intestacy, 374.
form of clause of, in a settlement, 441.
HOUNDS, 20.
HUSBAND, covenant to settle his property, 310.
no duty on legacy to, 356.
ancient rights of, 385.
right to wife's chattels personal, 387.
exception when wife entitled as next of kin to intestate, *ib.*
gifts by, to wife of jewels and trinkets, *ib.*
his right to wife's legal choses in action, 388.
equitable choses in action, 392.
exceptions under Married Women's Property Act, 1870, 389, 390.
effect of his assignment, 394.
his assignment of his wife's reversionary choses in action, 395.
release of, 397.
his liability to his wife's debts, *ib.*
exception as to marriages after 9th August, 1870..398.
wife's liability to maintain, *ib.*
fraud on his marital rights, 399.
authority of, to wife, to dispose of personal estate by will, *ib.*
separation of husband and wife, 403.
covenant to indemnify, against wife's debts, *ib.*
his right to the custody of infant children, 404.
and wife, remarks on law of, 409.

I.

IDIOT, 48.
transfer of stock of, 214.
ILLEGALITY of contracts, 78, 94, 95.
ILLEGITIMATE children, gift to, 363.
ILLUSORY appointments, 284.
IMMORAL publication, 96.

IMPORTATION of foreign reprints of English books, 260.
IMPRISONMENT of debtor in execution, 109.
abolition of imprisonment for debt, 110, 181.
the Debtors Act, 1869, provisions of, 110.
discharge of insolvent from, 174, 177.
saving of disability of, 417.
INCOME, apportionment of, 274.
INCORPORATION of joint stock companies, 225, 233.
INCORPOREAL personal property, 207.
anciently none, 4.
INCUMBENT, liability of, for dilapidations, 72, 73.
INDEMNITY of trustees, 307.
INDIAN government notes, 349.
what is East India stock, 297.
INDORSEMENT of sale of ship on certificate of registry, 60.
of bills and notes, 90, 91, 92.
special, 91.
in blank, 90.
INDUSTRIAL and provident societies, 241.
INFANCY, confirmation of debt incurred in, 82, 88.
saving of disability of, 417, 419.
INFANT, 47, 48.
cannot be a bankrupt, 140.
stock of, 213.
executor, 342.
legacy to, 357.
marriage settlements of, 384.
custody of, 404, 405, 408.
INFERIOR courts of record, 103.
judgments of, 111.
INJUNCTION, writ of, 67.
INJURY, actions by executors in respect of, 69.
actions against executors in respect of, 71.
INSOLVENCY, 174—182.
declaration of, 153.
in the colonies, 143.
INSOLVENT debtors, court for relief of, now abolished, 180.
schedule of, 177.
discharge of, 172, 174, 177, 178.
warrant of attorney formerly executed by, 178.
INSPECTORSHIP, deed of, 128.
committee of inspection, 149, 151, 172.
INSURANCE, 183.
of life, 183, 184.
interest of creditor, 184.
of trustee, 185.
stamp duties on, 185, n.

INSURANCE, assignees of life policies may sue in their own names, 186.
by married woman for separate use, 187.
by married man for wife and children, *ib.*
fire, 188, 189.
relief against forfeiture by breach of covenant, 189.
lessor to have benefit of informal, *ib.*
protection of purchasers against breach of covenant, *ib.*
of ships, *ib.*
assignee may sue in his own name, 190.
companies, 234.
INTEREST, legal rate of, 100.
on bills and notes, 100, 120.
on judgment debt, 108.
on bond, 114.
on debts, 120.
appropriation of payments towards, 128.
on debts proved in bankruptcy, 156.
always apportioned, 276.
limitation of actions for arrears of, 420.
INTERNATIONAL copyright, 263.
INTESTACY, 367—381.
INVENTOR of patent, 249.
INVESTMENT of settled funds, 294, 295, 297, 298, 299.
form of trust to continue or vary with consent, 439.
consent to change, 299.
IRELAND, real securities in, 296.
IRISH patent, 253.
ISSUE, appointment to, 287.

J.

JOINT bequest, no lapse by decease of one legatee, 364.
bond, all must sue, 315.
release by one obligee bars all, *ib.*
form of, 321.
and several bond, 317.
form of, 323.
covenant, 317.
form of, 323.
and several covenant, 317.
and several debts in bankruptcy, 326.
creditor, bankruptcy of, 319.
debtors, 322, 323, 325.
in bankruptcy, 168.
liability, 321.
and several liability, 323.
of partners, 325, 326.

JOINT owners, 315.
trustees made, 316.
shares of, under a will, need not vest at the same time, *ib.*
limitation to them, their executors, administrators and assigns, 317.
JOINT stock companies, 219.
incorporated by charter or act, *ib.*
companies clauses acts, 219, 221.
inconvenience of unincorporated, 222.
registration act, 224.
banking, 223, 226.
sale of shares in banking companies, 240.
letters patent, 223.
registry office, 224.
registered office of, 234.
liability of shareholders in, 223, 226, 238, 333.
transfer of shares, 226.
bankruptcy of, 227.
with limited liability, 228, 230.
shares in, not goods, wares or merchandize, 240.
settlement of shares, 274.
powers of directors of, 332.
liability of provisional committeemen of projected, 333.
provisional registration, 225.
complete registration, 225, 233.
incorporation, 225, 233.
acts, objects of, 227.
winding-up acts, 227, 237.
acts 1862 and 1867..228, 229, 237.
arrangement act, 1870..237.
liability may be limited, 229.
company may have directors with unlimited liability, 230.
power to reduce capital, 232.
subdivision of shares, *ib.*
memorandum of association, 230, 231, 232.
articles of association, 232.
shares personal estate, 233.
register of members, *ib.*
name of limited company to be painted up, 234.
judgment debts, 244.
name may be changed, 232.
certificates of shares or stock, 234.

JOINT stock companies, register evidence, 234.
register of mortgages, *ib.*
associations not for profit, registration of, *ib.*
special resolution, 235.
contracts, how made, 236.
transfer of shares, 237.
share warrants, *ib.*
liquidators, 238.
contributories, *ib.*
companies seals act, 1864..239.
mortgage debenture act, 1865..*ib.*
life assurance companies acts, 1870, 72..*ib.*
sale of shares not within statute of frauds, 240.
JUDGE'S order, 105.
to be filed within twenty-one days, 108.
JUDGMENT, effect of, on goods, 53.
debtor summons, 143.
on warrant of attorney or cognovit, 105.
in case of bankruptcy, 143, 162.
debt, a debt of record, 103.
carries interest, 108.
entitled to preference in administration, *ib.*
but must be registered, 109.
foreign, *ib.*
creditors, remedies of, *ib.*
Scotch and Irish judgments, 111.
removal of judgments of inferior courts, *ib.*
registry of, in county courts, *ib.*
charge of, on stock, 215.
charge of, on shares, 244.
limitation of actions for money secured by, 418.
JUDICIAL separation of husband and wife, 407.
settlement on, 408.

K.

KIN, next of, their right to administration, 369.
how traced, 375.
KINDRED, degrees of, how traced, *ib.*
remarks on descent to distant, 380.

L.

LABOURERS' Dwellings Act, 1855..243.
LANDS, sale of, 37, 301.
warranty on, 416.
investment of settled funds in purchase of, 299, 444.

LAPSE, 364.
LEASEHOLD property, succession duty on, 356.
LEGACIES, no action at law for pecuniary, 6.
payment of, 354.
duty on, 355.
no duty on, to husband, wife or royal family, 356.
to infants, 357.
duty on annuities, *ib.*
specific, *ib.*
ademption of, 358.
demonstrative, *ib.*
general, *ib.*
for valuable consideration, 359.
in lieu of dower, *ib.*
satisfaction of debts by, *ib.*
satisfaction of portions by, *ib.*
to charities, 361.
to illegitimate children, 363.
lapse of, 364.
to children, 365.
limitations of suits for, 418.
LEGATEE, rights of residuary, 364.
LESSOR to have benefit of informal insurance, 189.
LETTERS Patent, 223, 245, 320.—See also PATENT.
LEVARI facias, writ of, 54.
LIABILITY, limitation of, by letters-patent, 223.
in joint stock company, 229, 230.
joint, 321—325.
discharge by bankruptcy act, 321.
by statute of limitations, 322.
joint and several, 323, 325.
of partners in trade, 325—331.
of executor carrying on trade, 328.
of executor for debts, 354, 355.
LICENCE, letter of, 128.
to use patent, 253.
LIEN, 27, 31.
how lost, 31, 43.
of solicitors, 29, 31.
of vendor, 43.
on property from covenant to settle, 310.
LIFE insurance, 183.
policies, assignment of, 124, 427.
Life Assurance Companies Acts, 1870, 72; 239.
assignees may sue in their own names, 186.
defence or reply on equitable grounds may be pleaded, *ib.*
notice of assignment, *ib.*

LIFE insurance, acknowledgment of notice of assignment of policy of, 187.
principal places of business to be specified on policy, 186.
of married woman, 390.
LIFE, no estate for, in personal property at law, 270.
bequest of term for, 271.
interests in equity in personalty, 272, 278.
right of tenant for, as to bonus, 274.
apportionment of income of tenant for, *ib.*
LIMITATION to joint owners, 316.
LIMITATIONS, Statute of, 82, 87, 88, 116, 322, 417.
as to choses in action, 417.
executors or administrators not bound to plead, 422.
operation of, barred by charge of real estate, *ib.*
operation of, not barred by charge of personal estate, 423.
LIMITED Liability Act, 1855..228.
LIQUIDATED damages, 76.
LIQUIDATION by arrangement, regulations as to, 169.
power of trustee under, 171.
LITHOGRAPH, copyright in, 263.
LOAN societies, 241.
LONDON, custom of, 334, 377.
LORDS, House of, a superior court of record, 103.
bankrupt peers, 182.
LOST article, 23.
LUNATIC, 48.
transfer of stock of, 214.

M.

MAINTENANCE, crime of, 498.
of children, provisions for, 291, 292, 293, 294, 408.
form of power of, in a settlement, 442.
MAKER of promissory note, 90.
MALA *fides* on receipt or negociable securities, 412.
prohibita, 95.
in se, 95, 96.
MANDAMUS, writ of, 67.
MANUFACTURED goods, property in, 39, 40.
contract to furnish, 417.
MANUFACTURES, patent for new, 247.
copyright in designs for articles of manufacture, 266.
MAPS, copyright in, 261.
MARINE INSURANCE, 189.
policies, assignment of, 124, 190.

MARINE INSURANCE, assignee may sue in his own name, 190.
MARINES, wills of, and administration to, 337, 351, 373.
MARITAL rights, fraud on husband's, 399.
MARKET overt, sale of chattels in, 413.
sale of stolen goods in, *ib.*
MARKS, trade, 267.
MARRIAGE, a valuable consideration, 79.
restraints on, 382.
consent to, 383.
brocage, *ib.*
agreement on, must be in writing, 83.
settlement on, 310, 384.
dissolution of, 406, 408.
form of a settlement on, 436.
MARRIED Women's Property Act, 1870..187, 385, 389, 390.
MARRIED woman, 47, 48.
wages and earnings of, 389.
savings and stock of, *ib.*
entitled to money not exceeding 200*l.* under deed or will, *ib.*
property coming to, as next of kin or heiress, *ib.*
may maintain action in her own name, *ib.*
life assurance of married woman, *ib.*
when she may be bankrupt, 140.
liability for maintenance of children, 294.
executrix, 342.
saving of disability of, 417.
See also WIFE.
MATRIMONIAL causes, court for, 406.
MEMORANDUM in writing, what is, 42, 86.
MINOR, will of, now invalid, 335.
See CHILDREN, and INFANT.
MODELS, copyright in, 262.
MONEY, title to, 412.
limitation of action for money secured by bond, 418.
MONOPOLIES, statute of, 245.
MORTGAGE of goods, 51.
of ships, 62.
exempt from stamp duty, 64.
of ships, certificate of, *ib.*
right of mortgagee to freight, 66.
of property of bankrupt, 151.
of leaseholds, deduction of amount of debt from probate value, 352.
limitation of action for money secured by, 418.
MORTIS *causâ*, donatio, 340.

MORTMAIN, statute of, 360.
MOTHER, right of, under Statute of Distributions, 374.
MUSICAL compositions, copyright in, 258.

N.

NATIONAL Debt Act, 1870..211.
NATURALIZATION Act, 1870, provisions of, 46, 59.
NAVY, wills and administration to seamen in the, 336, 337, 350, 373.
NECESSARIES, husband bound to supply his wife with, 398, 407.
NEGOCIABLE securities, title to, 412.
See BILLS OF EXCHANGE, and PROMISSORY NOTES.
NEPHEWS, appointment to, 286.
NEWSPAPERS, copyright in, 265.
NEW TRUSTEES, appointment of, 302, 303, 305.
form of power to appoint, 447.
NEXT OF KIN, right of, to administration, 375.
their interest vests from the decease of the intestate, 371.
how traced, 375.
NOTE of a contract, what is, 41, 86.
NOTES, promissory, 89, 117, 125.
Indian government notes, 349.
not preferred in administration, 117.
carry interest, 120.
title to, 412.
NOTICE of dishonour of bill or note, 92.
to debtor on assigning the debt, 125.
of assignment of life policies, 186, 187.
to one partner notice to all, 331.
to trustees on assigning stock, 424.
NUNCUPATIVE will, 335.
who may now make, 336, 337.

O.

OBJECTS of a contract, lawful or unlawful, 94, 98.
OFFER, acceptance of, 87.
OFFICER, bankrupt, 176, 181.
probate of will of, 350.
OFFICIAL assignees, 148.
ORDER and disposition, goods in, of bankrupt, 56, 314.
choses in action in, of bankrupt, 425.
OUTLAWRY, forfeiture on, 48, 49.
OWNERSHIP, personal property the subject of absolute, 7, 9, 270.

P.

PAINTINGS, copyright in, 263.
PALATINE courts, superior courts of record, 103.
PARAPHERNALIA, 387.

PARLIAMENT, the supreme court, 103.
privilege of, does not prevent adjudication in bankruptcy, 168.
vacation of seat, by bankrupt, *ib.*
PAROL contracts, 77.
PARTICULAR lien, 28.
PARTNERS, liability of, 325—331.
bankruptcy of, 326, 330.
dormant, 325, 327.
ostensible, 327.
retiring, 328.
deceased, *ib.*
by participation in profits, *ib.*
liability for each other's acts, 321.
act to amend law as to, 329.
notice to one notice to all, 331.
PART owners of ships, 59.
PATENT, 235, 244, 245.
stamps on, 246.
term of, *ib.*
for new manufactures only, 247.
first inventor of, 249.
specification of, 248, 250.
disclaimer, 251.
register of, 252.
vesting of, in more than twelve persons, 253.
licence to use, *ib.*
Scotch and Irish, *ib.*
assignment of, 254.
register of proprietors of, 255.
tenants in common of, 320.
form of letters-patent, 431.
PAWN, 26, n., 27, 51.
PAYEE, 89.
PAYMENT of debts, 127.
by executor, 352.
charge of real estate for, 422.
of interest, 128.
PEERS, bankrupt, 182.
PENALTIES, limitation of actions for, 421.
PENALTY, 76, 115.
PENDENTE *lite*, administrator, 371.
PERIODICAL works, copyright in, 257.
PERPETUITIES, 281.
in exercise of powers, 288.
PERSONAL property, the subject of absolute ownership, 7, 270.
succession duty, 356.

PERSONAL annuity, 207.
PETITIONING creditor in bankruptcy, 146.
PHOTOGRAPHS, copyright in, 263.
PIOUS uses, 367.
PLANS, copyright in, 261.
PLEDGE of goods, 26, n., 27, 51.
by factor or agent, 415.
POLICY of insurance, 183.
assignment of, 426.
PORTIONS, appointment of, 284.
vesting of, charged on land, 290.
satisfaction of, by legacies, 360.
POSSESSION, choses in, 4.—See CHOSES IN POSSESSION.
goods in, of bankrupt, 56.
POSSIBILITY, 271.
how alienable, *ib.*
POST-OFFICE savings banks, 242.
POWER of attorney, 124.
construed strictly, 415.
decease of person giving, *ib.*
payment by trustee, executor, or administrator, in pursuance of, *ib.*
form of, 438.
POWERS, 282.
over personal property, 283.
of appointment, 350.
of appointment amongst children, 284, 286, 287.
trustee of bankrupt may exercise, 283.
frauds on, 288.
perpetuity in exercise of, *ib.*
to appoint new trustees, 302, 303.
form of power to appoint new trustees, 447.
given to married women, 402.
form of, of appointment amongst children, 441.
form of, given to a wife, 442.
PRIMOGENITURE, remarks on, 379.
PRINTS, copyright in, 261.
PRIVILEGE of parliament does not prevent adjudication in bankruptcy, 168.
vacation of seat by bankrupt, *ib.*
PROBATE, Court of, 345, 346, 369.
of wills, 345.
acts of executor before, *ib.*
in what court to be taken out, 346.
in principal registry, 347.
in district registry, *ib.*
evidence required on, *ib.*

PROBATE in common form, 348.
per testes, ib.
county courts, 349.
stamp duties on, 349, 350.
when exempt from stamp duties, 350, 351.
civil service, and military allowances, 351.
of seamen's wills, *ib.*
mortgage debt, deduction of amount of, from probate value, 352.
duty attaches to estate of deceased legatee, 365, n.
PROFITS of partnership, participation in, 328—330.
PROMISE, implied, 77.
insufficient of itself to form a contract, 79, 81.
PROMISSORY notes, 90, 117, 125, 137.
stamp duty, 93, n.
not preferred in administration, 117.
carry interest, 120.
title to, 412.
PROOF of debts in bankruptcy, 153, 154, 169.
PROPERTY, real and personal, 3, 7.
in British ships, 59.
in goods, 22, 32.
requisite to a grant, 33.
PROTEST, 91.
PROVISIONAL committee-man, liability of, 333.
PUBLIC officer of banking company, 223, 224.
PUBLICATION, immoral, 96.
PURCHASE of land, investment of settled funds in, 299.
PURCHASER from executor not bound to see to the application of his purchase-money, 353.
protection of, in bankruptcy, 159.

R.

RASURE of deeds, 94.
RATES and taxes due from bankrupt, 162.
REAL estate, charge of, for payment of debts, 422.
REAL securities, what are, 295.
in Ireland, 296.
RECEIPT by surviving joint owner, when good, 319.
by one executor a good discharge, 343.
by executor on sale a good discharge, 353.
by husband of wife's chose in action, 391, 392.
clause in settlements, 301.
form of, 446.
RECOGNIZANCE, 112.
limitation of actions on, 418.

RECORD, debts of, 103, 112.
courts of, 103.
of proceedings in bankruptcy, 148, 168.
REFERENCE to arbitration, 191, 192.
revocation of, 194.
REGISTRATION of bill of sale, 51, 52.
of ships, 59.
certificate of, 60.
of transfers of ships, 61.
of judgment debts, 109.
of judgments in county courts, 111.
of deeds of arrangement, 130, 131.
of joint-stock companies, 224, 225, 233.
of banking companies, 229.
of patents, 252, 255.
of copyrights, 258, 261.
of sculptures, 263.
of designs, 267.
in court of probate, 347.
REIMBURSEMENT of trustees, 307.
RELEASE by one joint obligee bars all, 315.
of one joint debtor discharges all, 321.
of one joint and several debtor, 324.
by husband of wife's reversionary chose in action, 397.
of money charged on real estate, *ib.*
RENT, arrears of, 112, 120.
distraint for, in bankruptcy, 155, 162.
proof in case of rent, 155.
limitation of actions for, 418.
RENUNCIATION of office of executor, 343.
REPLEVIN, action of, 3.
limitation of action of, 417.
REPUTED ownership, 57.
of chose in action, 425.
RESIDUARY legatee, rights of, 364.
RESIDUE, former right of executors to, 365.
right of next of kin to, 366.
form of assignment of a share in, 446.
RESPONDENTIA, 190.
RESTRAINT of trade, contract in, 97.
on accumulation, 281.
on anticipation, 401.
on marriage, 382.
RETAINER by executor of his own debt, 345.
by administrator of his own debt, 370.
REVERSIONARY chose in action of wife, assignment of, 395.
REVIEWS, copyright in, 257.

REVOCATION of submission to arbitration, 191.
of the trusts of a settlement, 312, 313.
of a will, 338.
ROYAL family, no duty on legacies to, 356.
RULE in *Shelley's case*, 280.

S.

SALE of goods, 37—44, 87.
of goods in market overt, 413.
of goods by factor or agent, 415.
of lands, direction for, converts them into money in equity, 300.
warranty on sale of lands, 416.
of ships, certificate of, 64.
SALVAGE, 28.
SATISFACTION of debts by legacies, 359.
of portions by legacies, *ib.*
SAVINGS banks, 251.
SCIRE facias to revive a judgment, 106.
SCOTCH patent, 253.
SCULPTURES, copyright in, 262.
SEA policies, assignment of, 124, 190.
SEAMEN, wills of, 336, 337.
probate of wills of, 351.
administration to effects of, 373.
SECURITIES of creditor, how affected by composition, 129.
for money won at play, 99.
secured creditor in bankruptcy, 145, 157.
proof in bankruptcy by creditors holding, 157.
government, what are, 295.
real, what are, *ib.*
real, in Ireland, 296.
stolen, 414.
SEPARATE USE, 390.
trust for woman's, 399, 400.
gift for "sole use" does not create trust for, 400.
form of a trust for, 440.
SEPARATION of husband and wife, 403.
SEQUESTRATION of profits of bankrupt, 176, 180, 181.
SET-OFF in bankruptcy, 156.
SETTLEMENT of personal property, 270.
wife's equity for, 392.
covenant for, of wife's future property, 310.
covenant for, of husband's property, *ib.*
voluntary, void as against creditors, 161, 162, 311.
voluntary, binding on settlor, 312.
power of revocation, *ib.*
for settlor's own benefit revocable, 313.

SETTLEMENT, voluntary, of personal estate, not void against subsequent purchasers, 313.
stamps on, 314.
on marriage, 310.
by infants, 384.
on judicial separation, 408.
antenuptial or postnuptial, inquiry into on dissolution of marriage, *ib.*
form of a marriage settlement of residuary personal estate and stock in the funds, 436.
SHARES in joint stock companies, 6, 218, 233.
sale of, 240.
transfer of, 226, 237, 426.
share warrants, 237.
title to, 428.
SHELLEY'S case, rule in, 280.
SHIPS, 58.
ownership of, 59.
alien cannot own British ship, *ib.*
colonial shipping, 58, n.
register, no trusts entered on, 59.
transfer of property in, 61.
equities may be enforced against owner and mortgagees, 60.
mortgage of, 62.
right of mortgagee to freight, 66.
no stamp duty on transfer of, 64.
certificate of registry, 60.
certificate of mortgage of, 64.
general ship, 65.
insurance of, 189.
assignee may sue in his own name, 190.
SHOPS in the city of London are market overt, 413.
SIGNATURE to contracts, 86.
SIMPLE contract debts, 104, 116.
limitation of actions for, 420.
SISTERS, right of, under Statute of Distributions, 374.
SOLDIERS, wills of, 336.
probate of wills of, 350, 351.
administration to effects of, 373.
SOLE use, gift for, 400.
SOLICITOR, lien of, 29, 31.
contract by, 101.
Attornies and Solicitors Act, 1870..101.
not liable as such to bankrupt laws, 140.
cannot charge for professional trouble as trustee, 305.
may be paid for services as trustee in bankruptcy, 152.
SPECIALTY debts, 104, 112, 117.

SPECIALTY debts, abolition of priority of, 104, 113, 120.
limitation of actions for, 418.
SPECIFIC legacy, 357.
SPECIFICATION of patent, 248, 250.
STAMP duty, none on agreement for sale of goods, 42, n.
none on transfer of ships, 64.
on charter-party, 65, n.
agreements, 84, n.
bills and notes, 93, n.
warrants of attorney, 106, n.
bonds, 115, n.
deeds of arrangement, 131, 133.
contract notes and on mortgage of stock, 213.
policies of life insurance, 185, n., 314.
fire insurance, repeal of, 189, n.
sea insurance, 190, n.
awards, 206.
mortgage to building society, 243.
letters-patent, 246.
appointment of new trustees, 304.
settlements, 314.
probates, 349, 350.
legacies, 314, 356.
letters of administration, 372.
shares of intestate's estates, 377.
STATUTE of Frauds.—See STATUTE 29 CAR. II. c. 3.
STATUTES cited—
13 Edw. I. c. 18, (elegit,) 53.
c. 19, (intestates,) 368.
c. 45, (*scire facias*,) 106.
4 Edw. III. c. 7, (action by executors,) 69.
15 Edw. III. c. 5, (executors,) *ib.*
31 Edw. III. c. 11 (administrator,) 368.
21 Hen. VIII. c. 5, (next of kin,) 369.
27 Hen. VIII. c. 10 (Statute of Uses,) 11, 80.
32 Hen. VIII. c. 37, (arrears of rent,) 392.
37 Hen. VIII. c. 9, (interest,) 5, 120.
2 & 3 Phil. & Mary, c. 7, (stolen horses,) 414.
13 Eliz. c. 5, (gifts for defrauding creditors,) 50, 54, 311.
c. 7, (bankrupts,) 142, 147.
c. 20, (charges on benefices,) 98.
14 Eliz. c. 11, s. 18, (dilapidations,) 73.
27 Eliz. c. 4, (voluntary settlements,) 313.
31 Eliz. c. 12, (stolen horses,) 414, 415.
21 Jac. I. c. 3, (patents,) 245, 246.
c. 16, (Statute of Limitations,) 82, 87, 417, 420.
22 & 23 Car. II. c. 10, (distribution,) 370, 374.

STATUTES cited—
29 Car. II. c. 3, (Statute of Frauds,) ss. 1, 2..34, 39, 55, 83, 213.
s. 4, (contract in writing,) 42, 311, 355.
s. 16, (writ of *fieri facias*,) 54.
s. 17, (sale of goods,) 38
ss. 19—21, (nuncupative testament,) 335.
s. 22, (revocation of will of personal estate,) 336.
s. 23, (soldiers and mariners,) 337.
s. 25, (husband,) 374, 392.
1 Jac. II. c. 17, (distribution,) 374.
2 Will. & Mary, sess. 1, c. 5, s. 2, (distress for rent,) 32.
4 & 5 Will. & Mary, c. 2, (custom of York,) 334.
7 & 8 Will. III. c. 38, (custom of Wales,) *ib.*
8 & 9 Will. III. c. 11, (judgments,) 116.
9 & 10 Will. III. c. 15, (arbitration,) 193, 201, 202.
2 & 3 Anne, c. 5, (custom of York,) 334.
3 & 4 Anne, c. 9, (promissory notes,) 5, 125.
4 Anne, c. 16, (nuncupative testaments,) 335.
4 & 5 Anne, c. 16, (bond debts,) 115.
7 Anne, c. 25, (promissory notes,) 5, 125.
8 Anne, c. 19, (copyright,) 256.
9 Anne, c. 14, (money won at play,) 99.
12 Anne, stat. 2, c. 16, (usury,) 100.
1 Geo. I. stat. 2, c. 19, (stock,) 211, 217.
11 Geo. I. c. 18, (custom of London,) 334.
7 Geo. II. c. 8, (stock jobbing,) 99, 212.
8 Geo. II. c. 13, (copyright in prints, &c.,) 261.
9 Geo. II. c. 36, (mortmain,) 360, 361.
19 Geo. II. c. 37, (ship insurance,) 184, 190.
7 Geo. III. c. 38, (copyright in prints,) 261.
14 Geo. III. c. 48, (life insurance,) 184.
c. 78, (Metropolitan Building Act,) 188.
17 Geo. III. c. 30, (bills of exchange,) 90.
c. 57, (copyright in prints, &c.,) 261.
36 Geo. III. c. 52 (legacy duty,) 341, 355, 357.
38 Geo. III. c. 71, (copyright in sculptures, &c.,) 262.
c. 87, (infant and absent executor,) 342, 371.
39 & 40 Geo. III. c. 98, (accumulations,) 282.
41 Geo. III. c. 107, (copyright,) 256.
46 Geo. III. c. 135, (bankruptcy,) 158.
48 Geo. III. c. 88, (bills of exchange,) 90.
c. 123, (discharge of small debtors,) 180.
49 Geo. III. c. 121, (bankruptcy,) 158.
54 Geo. III. c. 56, (copyright in sculptures, &c.,) 262, 263.
c. 156, (copyright,) 256.
55 Geo. III. c. 184, (stamps,) 42, 349, 351, 356, 372, 373, 377.
56 Geo. III. c. 60, (unclaimed dividends,) 423.

STATUTES cited—

56 Geo. III. c. 137, (bankruptcy,) 158.
3 Geo. IV. c. 39, (warrants of attorney and cognovits,) 106, 108.
4 Geo. IV. c. 83, (factors and agents,) 415.
6 Geo. IV. c. 16, (bankruptcy,) 51, 56, 81, 126, 131, 147, 158, 163, 283, 311, 322, 326.
c. 94, (factors and agents,) 415.
7 Geo. IV. c. 6, (bills and notes,) 90.
c. 46, (banking companies,) 223.
c. 57, (insolvency,) 174.
7 & 8 Geo. IV. c. 29, (stolen goods,) 414.
9 Geo. IV. c. 14, (written contracts,) 40, 82, 87, 88, 322, 421.
c. 32, (felony,) 48.
10 Geo. IV. c. 56, (friendly societies,) 240.
11 Geo. IV. & 1 Will. IV. c. 20, (seamen's wills,) 337, 351.
c. 38, (insolvency,) 174.
c. 40, (executors trustees of residue,) 366.
c. 46, (illusory appointments,) 284.
c. 65, (infants, idiots and lunatics,) 214.
1 & 2 Will. IV. c. 32, (game act,) 20, 21.
c. 56, (bankruptcy court,) 56, 126, 139, 147.
2 & 3 Will. IV. c. 40, (seamen's wills,) 351.
3 & 4 Will. IV. c. 15, (copyright in dramatic works,) 258.
c. 27, (limitations,) 418, 419, 420.
c. 42, s. 2, (actions by and against executors,) 69, 71, 418.
s. 3, (limitation,) 419, 421.
s. 4, (disabilities,) 419, 421.
s. 5, (acknowledgment,) 419.
ss. 28, 29, (interest,) 121.
s. 39, (arbitration,) 195, 198.
s. 40, (witnesses on arbitration,) 195.
c. 47, (bankruptcy,) 139.
c. 74, (fines and recoveries,) 395, 397.
c. 98, (bills and notes,) 100.
c. 105, (dower,) 359.
4 & 5 Will. IV. c. 22, (apportionment of income,) 275.
c. 25, (seamen's pay,) 351.
c. 29, (real securities in Ireland,) 296.
c. 40, (friendly societies,) 240.
c. 94, (public officer,) 223.
5 & 6 Will. IV. c. 41, (securities for illegal consideration,) 96, 99, 100.
c. 83, (patents,) 247, 248, 251.
6 & 7 Will. IV. c. 32, (building societies,) 242, 243.
c. 59, (copyright in prints, &c.,) 261, 262.
c. 76, (newspapers,) 265.

STATUTES cited—
7 Will. IV. & 1 Vict. c. 26, (wills,) 218, 279, 334, 335, 336, 337, 338, 348, 364, 365.
c. 73, (public officer,) 223.
1 & 2 Vict. c. 96, (banking companies,) 223.
c. 110, (insolvent debtors,) 139, 174.
ss. 9, 10, (execution of warrants of attorney,) 107.
s. 12, (seizure of notes and securities,) 125, 311.
s. 13, (judgments a charge on real estate,) 162.
ss. 14, 15, (charging stock,) 216, 217, 244, 311.
s. 16, (imprisonment,) 110.
s. 17, (interest on judgment debt,) 108.
s. 22, (judgment of inferior courts,) 111.
s. 35, (discharge,) 175.
s. 36, (petition by creditor,) *ib.*
s. 37, (vesting order,) *ib.*
s. 45, (assignees,) 176.
s. 47, (sale,) *ib.*
s. 48, (mortgage,) *ib.*
s. 55, (benefice,) *ib.*
s. 56, (officer,) *ib.*
s. 59, (voluntary preference,) *ib.*
s. 62, (dividend,) *ib.*
s. 69, (schedule,) 177.
ss. 70, 71, 72, (examination,) *ib.*
s. 75, (discharge,) *ib.*
ss. 76, 77, 78, (postponement of discharge,) 177, 178.
s. 79, (costs,) 178.
s. 80, (annuities,) *ib.*
ss. 87, 88, 89, (future execution,) *ib.*
ss. 90, 91, (freedom from execution,) *ib.*
2 & 3 Vict. c. 11, (bankruptcy,) 139, 158.
c. 29, (bankruptcy,) *ib.*
c. 37, (usury,) 100.
c. 54, (custody of infants,) 405.
c. 67, (patents,) 247.
3 & 4 Vict. c. 73, (friendly societies,) 240.
c. 82, (stock, judgments,) 216, 311.
c. 110, (loan societies,) 211.
c. 111, (banking companies,) 223.
5 Vict. c. 5, (Court of Exchequer in Equity,) 215.
5 & 6 Vict. c. 39, (factors and agents,) 415.
c. 45, (copyright,) 256, 257, 258, 259, 260, 261.
c. 79, (stamps on probates,) 349.
c. 85, (banking companies,) 223.

STATUTES cited—
5 & 6 Vict. c. 100, (copyright in designs,) 266.
c. 116, (insolvency,) 178, 179.
c. 122, (bankruptcy,) 56, 81, 139, 147, 319, 322, 326.
6 & 7 Vict. c. 65, (copyright in designs,) 266.
c. 66, (index to warrants of attorney,) 108.
7 & 8 Vict. c. 12, (international copyright,) 263, 264, 265.
c. 32, (bank notes,) 90.
c. 66, (aliens,) 46.
c. 69, (patents,) 247, 251.
c. 70, (arrangements between debtors and creditors,) 180.
c. 76, (transfer of property,) 271.
c. 96, (insolvency,) 110, 139, 178, 179.
c. 110, (joint stock companies,) 219, 224, 225, 226, 227.
c. 111, (bankruptcy of joint stock companies,) 227.
c. 113, (banking companies,) 219, 226, 227.
8 & 9 Vict. c. 16, (Companies Clauses Consolidation Act,) 220, 221, 222.
c. 18, (lands clauses consolidation,) 220.
c. 20, (railways clauses consolidation,) 29, 220.
c. 48, (bankrupt's oath,) 139.
c. 62, (unclaimed dividends,) 423.
c. 76, (legacy duty,) 341, 355, 356.
c. 93, (copyright in colonies,) 260.
c. 97, (stock,) 214, 218.
c. 106, (real property,) 34, 271.
c. 109, (gaming and wagering,) 99.
c. 127, (execution,) 55, 110.
9 & 10 Vict. c. 27, (friendly societies,) 240.
c. 93, (death by accident, compensation,) 69, 70.
c. 95, (small debts,) 6, 103, 110.
10 & 11 Vict. c. 14, (markets clauses consolidation,) 220.
c. 15, (gas clauses consolidation,) *ib.*
c. 17, (water clauses consolidation,) *ib.*
c. 27, (harbours clauses consolidation,) *ib.*
c. 34, (paving clauses consolidation,) *ib.*
c. 65, (cemeteries clauses consolidation,) *ib.*
c. 78, (joint stock companies,) 224, 225, 226.
c. 83, (aliens,) 46.
c. 95, (copyright in colonies,) 260.
c. 96, (trust funds,) 308.
c. 102, (bankruptcy and insolvency,) 139, 175, 178, 179.
11 & 12 Vict. c. 29, (hares,) 20.
c. 45, (Winding-up Act,) 227.
c. 86, (bankruptcy,) 139.
12 & 13 Vict. c. 67, (sequestration,) 176.

STATUTES cited—
12 & 13 Vict. c. 74, (trustees' relief,) 308.
c. 101, (small debts,) 103.
c. 106, (bankruptcy,) 139.
s. 8, (rules,) 148.
ss. 6—11, (commissioners,) 147.
s. 66, (who traders,) 140.
s. 67, (acts of bankruptcy,) 141.
s. 68, (composition deeds,) 131.
ss. 78—79, (affidavit of debt,) 144.
s. 81, (admission of debt,) *ib.*
s. 125, (order and disposition,) 51, 56.
s. 126, (voluntary gifts,) 311.
s. 129, (one year's rent,) 163.
s. 133, (executions, &c.) 158.
s. 140, (joint creditors,) 326.
s. 141, (assignees,) 126, 166.
s. 142, (assignees,) 166.
s. 147, (powers,) 283.
s. 152, (joint debts,) 319.
s. 168, (clerk's pay,) 163.
s. 169, (labourer's wages,) *ib.*
s. 198, (certificate,) 163.
s. 199, (certificate), *ib.*
s. 200, (certificate,) 163, 322.
s. 204, (promise to pay barred debt,) 81.
s. 224, (arrangements by deed,) 131.
sched. Z., 164.
c. 108, (winding-up amendment,) 228.
13 & 14 Vict. c. 21, (interpretation,) 199.
c. 35, (Court of Chancery,) 354, 370.
c. 60, (Trustee Act, 1850,) 304, 305.
c. 61, (small debts,) 6, 104.
c. 83, (railways,) 228.
c. 104, (Designs Act, 1850,) 263, 266, 267.
c. 115, (friendly societies,) 240.
14 & 15 Vict. c. 8, (designs,) 266.
c. 25, (agricultural fixtures, emblements,) 15, 18.
c. 99, (evidence,) 195.
15 & 16 Vict. c. 3, (administration for crown,) 377.
c. 6, (designs,) 266.
c. 12, (international copyright,) 262, 265.
c. 24, (wills amendment,) 336.
c. 31, (industrial societies,) 241.
c. 54, (small debts,) 104, 111.
c. 55, (trustees,) 304, 305.
c. 65, (friendly societies,) 240.

STATUTES cited—

15 & 16 Vict. c. 76, (common law procedure,) 24, 75, 76, 77, 106, 126, 343.
c. 83, (patent law amendment,) 245, 247, 248, 249, 250, 251, 252, 253, 254, 256.
16 & 17 Vict. c. 5, (stamps on patents,) 246, 254.
c. 51, (succession duty,) 314, 316, 356, 357.
c. 59, (stamps,) 91.
c. 70, (lunatics,) 214.
c. 107, (copyright,) 260.
c. 115, (patents,) 247, 249, 251.
c. 123, (friendly societies,) 240.
17 & 18 Vict. c. 16, (county courts jurisdiction,) 104, 179.
c. 25, (industrial and provident societies,) 241.
c. 36, (bills of sale,) 51.
c. 90, (repeal of usury laws,) 100.
c. 101, (friendly societies,) 240.
c. 104, (Merchant Shipping Act,) 29, 58, 59, 60, 61, 62, 63, 64, 338, 351.
c. 120, (Merchant Shipping Repeal Act,) 58.
c. 125, (Common Law Procedure Act, 1854),
ss. 3, 6, 7, (arbitration,) 193.
ss. 5, 8, 9, (award,) 201, 202, 203.
s. 11, (proceedings at law may be stayed by arbitration,) 193.
s. 12, (appointment of arbitrator by a judge,) 196, 204.
s. 13, (death of arbitrator,) 197.
s. 14, (appointment of umpire,) 203.
s. 15, (time for making award,) 198, 204.
s. 16, (possession of lands,) 205.
s. 17, (submission to arbitration by consent may be made a rule of court,) 194, 195.
s. 60, (court may examine judgment debtor as to debts owing to him,) 126.
ss. 61, 65, (garnishee,) *ib.*
ss. 68, 69, (writ of mandamus,) 67.
s. 78, (order for restitution of chattels,) 4.
ss. 79—82, (writ of injunction,) 68.
18 & 19 Vict. c. 15, s. 7, (judgments,) 111.
c. 43, (marriage settlement of infants,) 384.
c. 63, (friendly societies,) 240, 241.
c. 67, (bills of exchange and promissory notes,) 93.
c. 91, (merchant shipping amendment,) 29, 58, 61.
c. 111, (bills of lading,) 6, 36, 65.
c. 122, (fire insurance,) 188.

STATUTES cited—
18 & 19 Vict. c. 132, (labourers' dwellings,) 243.
c. 133, (Limited Liability Act,) 228.
19 & 20 Vict. c. 40, (provident societies,) 241.
c. 47, (joint stock companies,) 228.
c. 94, (administration), 377.
c. 97, s. 1, (writ of execution, *bonâ fide* purchaser,) 54, 413.
s. 2, (restitution of chattels,) 4.
s. 3, (consideration for promise,) 84.
s 5, (surety,) 122.
s. 10, (infancy, coverture, lunacy,) 417, 419, 420.
s. 11, (joint debtor, absence beyond seas,) 322, 419.
s. 12, (absent debtors,) 322, 417, 420.
s. 13, (debts, limitations,) 82, 88, 421.
s. 14, (co-contractor's interest,) 88, 325.
c. 108, (Small Debts Act,) 6, 104.
20 & 21 Vict. c. 14, (winding-up acts,) 219, 228.
c. 49, (joint stock companies,) 219, 228, 229.
c. 54, (fraudulent trustees, bankers,) 309.
c. 57, (disposition of wife's reversionary interest), 395, 410.
c. 77, (Court of Probate Act, 1857,) 345, 369.
s. 3, (lords of manors,) 346.
s. 23, (court of record,) 103.
s. 29, (practice,) 348.
ss. 46, 47, (district registry,) 347.
s. 59, (abode of testator,) *ib.*
s. 70, (administrator *pendente lite*,) 371.
s. 71, (receiver,) 372.
ss. 72, 74, (administrator,) 371.
s. 73, (administration,) 372.
s. 79, (executor,) 344.
s. 86, (voidable probates,) 347.
c. 78, (Joint Stock Companies Winding-up,) 227, 228.
c. 79, (probates,) 349.
c. 80, (Joint Stock Companies,) 229.
c. 85, (Court for Divorce and Matrimonial Causes,) 406.
s. 7, (decree for judicial separation,) 406.
s. 21, (protection order,) 407.
ss. 24, 32, (alimony,) *ib.*
s. 25, (wife *feme sole*,) 407, 408.
s. 26, (wife's necessaries, joint power,) 407.

STATUTES cited—
20 & 21 Vict. c. 85, s. 27, (petition,) 406.
s. 35, (custody and maintenance of children,) 408.
s. 45, (children's settlement,) *ib.*
s. 57, (petition,) 406.
21 & 22 Vict. c. 27, (Court of Chancery), 68.
c. 56, (probates,) 349.
c. 60, (joint stock companies,) 228, 229.
c. 70, (copyright,) 266, 267.
c. 74, (small debts,) 104.
c. 91, (joint stock companies,) 228, 229.
c. 95, (executors,) 344, 345, 349, 369, 370, 371, 373.
c. 101, (Court for Divorce,) 240.
c. 108, (wife's property,) 406, 407.
22 Vict. c. 13, (patents, munitions of war,) 251.
22 & 23 Vict. c. 35, s. 6, (fire insurance), 189.
s. 7, (informal insurance,) 189.
s. 8, (purchaser,) 189.
s. 12, (powers,) 283.
s. 21, (assignment to self,) 428.
s. 23, (payment of money by trustees,) 302.
s. 24, (concealment of deeds,) 428.
s. 26, (power of attorney,) 415.
ss. 27, 28, 29, (administration,) 355, 370.
s. 30, (trustees may apply for opinion of judge,) 309.
s. 31, (trustees,) 307.
s. 32, (investments,) 297.
c. 36, (stamps on probates,) 349.
c. 57, (imprisonment for debt,) 104.
c. 61, (divorce amendment,) 406, 408.
23 Vict. c. 5, (Indian government notes,) 350.
c. 15, (stamps,) 36, 350.
c. 28, (stock jobbing,) 99, 213.
23 & 24 Vict. c. 38, ss. 3, 4, (registered judgment,) 108, 109.
s. 8, (concealment of deeds,) 428.
s. 9, (trustees may apply for opinion of judge,) 309.
s. 10, (investments,) 297.
s. 11, (investments,) 297.
s. 12, (investments,) 297.
s. 13, (personal estate of intestate,) 418.
s. 14, (accounts in chancery,) 354, 370.
c. 58, (friendly societies,) 240.
c. 83, (infants' settlements, Ireland,) 384.
c. 106, (railways,) 220.

STATUTES cited—
23 & 24 Vict. c. 111, (stamps,) 36, 90.
c. 126, s. 13, (Common Law Procedure Act, 1860; bill of sale,) 55.
s. 28—31, (garnishee,) 126.
s. 32, (costs,) 68.
c. 127, s. 28, (solicitor's lien,) 31.
c. 144, (divorce,) 406, 408.
c. 145, s. 25, (investment of trust monies,) 298.
s. 26, (maintenance,) 293.
s. 27, (appointment of trustees,) 303.
s. 29, (receipt of trustees,) 302.
s. 30, (executors,) 353, 370.
s. 34, (date of operation,) 293, 299.
24 Vict. c. 3, (transfer of stock,) 212, 423.
c. 5, (exchequer bills,) 295.
c. 10, (Court of Admiralty,) 29, 64, 103.
c. 14, (post office savings banks,) 242.
24 & 25 Vict. c. 73, (designs for articles of manufacture,) 266.
s. 34, (fixtures, bills of sale,) 52.
c. 92, s. 3, (probate, voluntary debts,) 352.
c. 95, (criminal statutes repeal,) 309, 414.
c. 96, ss. 80—86, (fraudulent trustees,) 309.
s. 100, (restitution of stolen property,) 414.
c. 114, (domicile,) 338, 339.
c. 121, (domicile,) 339, 340.
c. 134, (Bankruptcy Act, 1861,) 139, 180.
s. 2, (reduction of London commissioners,) 147.
s. 3, (jurisdiction of county courts,) *ib.*
s. 4, (county courts,) *ib.*
ss. 19—27, (abolition of insolvent court,) 180.
s. 69, (all debtors subject to bankrupt laws,) 180.
s. 71, (acts of bankruptcy,) 142.
s. 72, (declaration of insolvency,) 143.
s. 73, (execution,) 119, 143.
s. 75, (insolvency in colonies,) 143.
s. 76, (judgment debtor summons,) *ib.*
s. 77, (decrees and orders,) 144.
s. 83, (summons, adjudication of bankruptcy,) *ib.*
ss. 98—107, (pauper and lunatic prisoners,) 180.
s. 108, (official assignees,) 56.
s. 117, (assignees,) 56, 149.
s. 128, (debts under 10*l.*,) 149.

STATUTES cited—
24 & 25 Vict. c. 134, s. 134, (half-pay, &c.,) 180.
s. 135, (sequestration of benefice,) *ib.*
s. 157, (certificates,) 164.
s. 159, (after-acquired property,) 166.
s. 161, (order of discharge,) 164.
s. 163, (discharge,) 322.
s. 164, (barred debt,) 81.
s. 177, (joint estates,) 327.
s. 192, (trust deeds for creditors,) 131, 133.
s. 194, (registration,) 129, 131.
s. 195, (stamps,) 131, 133.
s. 232, (construed with former acts,) 56.
25 Vict. c. 22, (inland revenue,) 350.
25 & 26 Vict. c. 63, (Merchant Shipping Act Amendment Act, 1862,) 29, 58, 66.
s. 3, (equities against owners and mortgagees of ships,) 60.
ss. 66—78, (lien for freight,) 29.
c. 68, (copyright works of art,) 263.
c. 81, (divorce,) 406, 408.
c. 86, ss. 12—14, (lunatics or idiots,) 214.
c. 87, (industrial and provident societies,) 241.
c. 88, (fraudulent marking of merchandise,) 267, 268, 417.
c. 89, (Companies Act, 1862,) 219, 224, 226, 228, 229.
s. 4, (partners,) 229.
s. 6, (memorandum of association,) *ib.*
s. 7, (liability may be limited,) 230.
s. 8, (shares,) *ib.*
s. 9, (guarantee,) 231.
s. 10, (memorandum of unlimited company,) *ib.*
s. 11, (effect of memorandum,) *ib.*
s. 12, (powers to alter memorandum,) 232.
s. 13, (change of name,) *ib.*
ss. 14, 15, (articles of association,) 233.
s. 16, (stamp on articles,) *ib.*
s. 17, (registration of articles,) *ib.*
s. 18, (certificate of incorporation,) *ib.*
s. 21, (licence to hold land,) *ib.*
s. 22, (shares personal estate,) *ib.*
s. 25, (register,) *ib.*
s. 26, (annual list of members,) 234.
s. 30, (register of members,) *ib.*
s. 31, (certificate of shares,) *ib.*
s. 37, (register evidence,) *ib.*

STATUTES cited—
25 & 26 Vict. c. 89, s. 38, (liability of contributories,) 238.
s. 39, (registered office,) 234.
s. 41, (name of limited company,) *ib.*
s. 43, (mortgages and charges,) *ib.*
s. 44, (annual statement,) 235.
s. 47, (bills and notes,) 333.
s. 50, (special resolution,) 235.
s. 51, (special resolution,) 236.
s. 53, (registry of special resolution,) *ib.*
s. 54, (copies of ditto,) *ib.*
s. 74, (contributories,) 238.
ss. 79—128, (winding up by the court,) 237.
s. 81, (court,) 238.
ss. 92—97, 133—144, (official liquidators,) *ib.*
ss. 129—146, (voluntary winding up,) 237.
ss. 147—152, (supervision of court,) *ib.*
s. 182, (banking company,) 229.
26 Vict. c. 14, (post office savings banks,) 242.
c. 28, (stock certificates,) 212.
26 & 27 Vict. c. 41, (lien of innkeepers,) 28.
c. 56, (loan societies,) 241.
c. 57, (regimental debts act,) 351.
c. 87, (savings banks acts amendment,) 242.
c. 92, (Clauses Consolidation Act, railways,) 220.
c. 93, (ditto waterworks,) *ib.*
c. 105, (bills and notes,) 90.
c. 118, (Companies Clauses Consolidation Act,) 220, 221.
27 Vict. c. 19, (companies seals,) 239.
27 & 28 Vict. c. 32, (banks,) 223.
c. 36, (army prize,) 351.
c. 44, (property of wife deserted,) 407.
c. 56, (stamps,) 184, 349.
c. 95, (death by injury,) 69, 70.
c. 112, (register of writs of execution,) 108, 162, 323.
c. 114, (improvement of land,) 295, 296.
c. 120, (railways,) 220.
c. 121, (railways,) *ib.*
28 Vict. c. 40, (trustees, County Palatine of Lancaster,) 303.
28 & 29 Vict. c. 72, (seamen's wills,) 337.
c. 78, (Mortgage Debenture Act,) 239.
c. 86, (partnership,) 329, 330.
c. 96, (stamps,) 65.
c. 99, (county courts,) 6, 104.
29 Vict. c. 28, (labouring classes' dwellings,) 243.
29 & 30 Vict. c. 14, (small debts,) 104.

STATUTES cited—
29 & 30 Vict. c. 32, (alimony,) 406, 407.
c. 96, (registration of bills of sale,) 51, 52.
30 Vict. c. 23, s. 3 *et seq.*, (stamps on sea policies, repeal of acts,) 190.
c. 28, (labouring classes' dwellings,) 243.
c. 29, (sale and purchase of shares,) 240.
30 & 31 Vict. c. 117, (industrial and provident societies,) 240, 241.
s. 3, (application of provisions of Friendly Societies Act,) *ib.*
c. 127, (railway companies,) 220.
c. 131, (Companies Act, 1862, amendment,) 228, 229, 333.
ss. 4—8, (unlimited liability of directors,) 230.
ss. 9—20, (reduction of capital and shares,) 232.
s. 21, (sub-division of shares,) *ib.*
s. 23, (associations not for profit,) 234.
ss. 27—33, (share warrants to bearer,) 237.
s. 28, (effect of share warrant,) *ib.*
s. 37, (contracts,) 237.
s. 40, (winding up petition,) *ib.*
ss. 41, 42, (winding up,) 238.
c. 132, (East India stock,) 297.
c. 142, (County Courts Acts Amendment,) 6, 104.
s. 24, (payment into court by trustees,) 308, 309.
s. 25, (extension of powers,) 308.
c. 144, (Policies of Assurance Act, 1867,) 6, 125, 186.
ss. 1—4, (assignment of life policies,) 186.
s. 3, (notice of assignment,) 427.
s. 6, (acknowledgment of notice,) 187.
31 & 32 Vict. c. 54, (judgments extension,) 111.
c. 71, (county courts admiralty jurisdiction,) 64, 104, 322.
c. 77, (divorce appeals,) 406.
c. 86, (assignees of marine policies,) 6, 125.
s. 1, (assignees of marine policies,) 190.
c. 90, s. 1, (public departments, payments,) 351.
s. 2, (sums under 100*l.*, powers of war department,) *ib.*
c. 104, (bankruptcy act amendment,) 133.
s. 3, (assent to composition deeds,) 135.
c. 124, s. 7, (mortgage debts on leaseholds, probate,) 352.
s. 11, (exemption of building societies from stamp duties restricted,) 213.
c. 129, (colonial shipping,) 58.

STATUTES cited—
31 & 32 Vict. c. 130, (artizans' and labourers' dwellings,) 243.
32 Vict. c. 14, s. 12, (duty on fire insurances repeal,) 189.
32 & 33 Vict. c. 46, (specialty and simple contract debts,) 104, 113, 119.
c. 48, (Companies Clauses Act Amendment,) 220, 221.
c. 51, (County Court Admiralty Jurisdiction Act Amendment,) 64, 104.
c. 59, (savings banks and post-office savings banks,) 242.
c. 61, (trades unions funds protection,) 240.
c. 62, (imprisonment for debt,) 110, 142, 165, 181.
ss. 4, 5, 6, 11, *et seq.* (exceptions,) 111.
s. 24, (execution of warrants of attorney,) 107.
s. 25, (informal execution of warrant,) *ib.*
s. 26, (filing warrant of attorney,) 106, 108.
ss. 27, 28, (filing judge's order,) 108.
c. 71, (Bankruptcy Act, 1869,) 81, 139, 181.
s. 4, (interpretation,) 312.
s. 6, (petition for adjudication,) 142, 145, 148.
par. 1, (act of bankruptcy,) 130.
par. 5, (act of bankruptcy,) 53, 119.
s. 8, (proceedings on petition,) 147, 148.
s. 10, (advertisement,) 148.
s. 11, (commencement of bankruptcy,) 159.
s. 12, (creditors bound by proceedings,) 81.
s. 14, (appointment of trustee,) 149.
s. 15, (property of bankrupt,) 51, 56, 166, 266, 283, 425.
s. 17, (devolution of property on trustee,) 56.
s. 22, (possession of property by trustee,) 127.
s. 25, (power of trustee,) 151.
s. 26, (management of property,) *ib.*
ss. 27—29, (compromise, composition,) 152, 153.
s. 31, (debts,) 155.
s. 32, (preferential debts,) 163.
s. 34, (distraint for rent, &c.,) 155, 163.
ss. 35—40, (distinct contracts, &c.,) 156, 157.
s. 40, (secured creditor,) *ib.*
s. 45, (surplus,) 163.
s. 48, (discharge,) 165.
s. 49, (effect of order of discharge,) 166.
s. 50, (joint debtors,) *ib.*
s. 54, (status of undischarged bankrupt,) 167.
59, (court,) 148.

STATUTES cited—
32 & 33 Vict. c. 71, s. 60, (London bankruptcy district,) 148.
s. 65, (London court,) 103.
s. 71, (appeal,) 162.
s. 79, (change of jurisdiction,) 148.
s. 80, par. 1, (affidavit of petitioner,) 146.
s. 83, (trustees,) 56.
par. 7, (official name of trustee,) 127.
s. 87, (proceeds of sale and seizure,) 153.
s. 88, (sequestration of ecclesiastical benefice,) 181.
s. 89, (pay of officers,) 182.
s. 90, (salary,) *ib.*
ss. 91, 92, (voluntary settlements and fraudulent preferences,) 161, 162.
ss. 94, 95, (protection of certain transactions,) 159, 160.
s. 100, (petition against one partner,) 326.
s. 103, (joint creditor,) 326.
s. 104, (joint and separate dividends,) 327.
s. 105, (suits by trustee and bankrupt's partner,) 319.
s. 107, (evidence,) 168.
s. 111, (power of assignee to sue,) 127.
s. 117, (removal of bankrupt from trusteeship,) 305.
s. 120, (privilege of parliament,) 168.
s. 121, (vacating seat,) 169.
s. 125, (liquidation by arrangement,) 173.
s. 126, (composition with creditors,) 135.
s. 128, (commissioners,) 148.
s. 130, (country district courts,) *ib.*
sched. 1, (description of traders,) 140.
c. 83, (insolvent debtors and bankruptcy repeal,) 51, 81, 107, 119, 126, 130, 131, 132, 133, 139, 180, 181, 283.
c. 114, (railways abandonment,) 220.
33 Vict. c. 14, (naturalization,) 46, 47, 59.
33 & 34 Vict. c. 19, (railways,) 220.
c. 20, (mortgage debentures,) 239.
c. 23, (felony,) 49, 50.
c. 28, (attornies and solicitors,) 101.
c. 35, (apportionment,) 274, 276, 277, 278.
c. 69, (statute law revision,) 211, 212, 214, 218, 423.
c. 70, (gas and water facilities,) 220.
c. 71, (national debt,) 209, 211, 212, 214, 218, 239, 423, 424.

STATUTES cited—
33 & 34 Vict. c. 76, (absconding debtors,) 146.
c. 78, (tramways,) 221.
c. 93, (married women's property,) 385, 386, 389, 409, 411.
s. 1, (earnings,) 389, 407.
s. 2, (deposits in savings banks,) 389.
s. 3, (property in the funds,) *ib.*
s. 4, (property in joint stock company,) *ib.*
s. 5, (property in a society,) *ib.*
s. 7, (personal property coming to married woman,) 387, 390.
s. 8, (freehold coming to married woman,) 390.
s. 10, (insurance of husband for benefit of wife,) 187, 188.
s. 11, (maintenance of action,) 390.
s. 12, (wife's contracts before marriage,) 398.
s. 13, (maintenance of husband,) 399.
s. 14, (maintenance of children,) 294, 399.
c. 97, (stamp duties,) 36, 42, 52, 65, 84, 93, 106, 115, 185, 190, 206, 213, 243, 304, 314.
c. 99, (inland revenue acts repeal,) 36, 42, 52, 65, 243.
c. 102, (oath of allegiance on naturalization,) 46.
c. 104, (Joint Stock Companies Arrangement,) 237.
34 Vict. c. 4, (stamps,) 213.
c. 27, (trust funds investment,) 298.
34 & 35 Vict. c. 31, (Trades' Union,) 98, 242.
c. 41, (Gasworks Clauses Act Amendment,) 220.
c. 43, (ecclesiastical dilapidations,) 72, 73, 74, 126.
c. 50, (bankruptcy disqualification,) 182.
c. 58, (life assurance companies,) 239.
c. 74, (bills of exchange and promissory notes,) 93.
c. 78, (railway regulation,) 220.
c. 80, (industrial societies,) 241.
c. 110, (Merchant Shipping Acts Amendment,) 29, 58.
35 & 36 Vict. c. 39, (naturalization,) 46, 47.
c. 41, (life assurance companies,) 239.
c. 44, (Court of Chancery Funds,) 216, 297, 308, 357.
c. 73, (Merchant Shipping Acts Amendment,) 29, 58.
c. 88, (expiring laws,) 90.
c. 93, (pawnbrokers,) 26.
c. 96, (ecclesiastical dilapidations,) 72.
36 Vict. c. 12, (custody of infants,) 405, 406.
c. 31, (Matrimonial Causes Amendment Act,) 406.

STATUTES merchant and staple, 112.
STOCK in trade, assignment of, 33.
in the funds, 6, 208—217.
is personal estate, 211.
jobbing, 99, 212.
transfer of, 211.
contract for sale of, 213.
distringas on, 214.
charge of judgment on, 215.
transmission of, by will, 217.
unclaimed dividends on, 423.
notice to trustee on assignment of, 424.
STOLEN goods, sale of, 413.
STOP order, 426.
STOPPAGE in transitu, 43.
SUBMISSION to arbitration, 191, 194.
SUCCESSION Duty Act, 1853..314, 316, 356.
SUPERIOR courts of record, 103.
SURETIES, 121.
discharge of, 123.
SURVIVORSHIP amongst joint owners, 315, 318.
none in equity of joint securities, 318, 319, 320.
none amongst owners in common, 321.
amongst joint debtors, *ib.*
as to joint and several debtors, 323, 324.
of office of executor, 343.

T.

TAIL, estate, none in personal property, 278.
TAXES due from bankrupt, 163.
TENANT without impeachment for waste, 19.
for years or for life, 18.
joint, 364.
in common, 319, 320.
bequest to, 364.
TENTERDEN, Lord, his act.—See statute 9 Geo. IV. c. 14.
TESTAMENTARY alienation, growth of right of, 334.
See WILL.
TIMBER, 16, 18.
trees, what are, 18.
TITLE, 412.
to money and negociable securities, 412.
to chattels personal, 413.

TITLE to stolen goods, 413.
to horses stolen, 414.
under factors and agents, 415.
warranty of, 416.
under Statutes of Limitation, 417—421.
to unclaimed dividends, 423.
to choses in action by notice, 424.
through deeds, wills, &c., 427.
abstract of, *ib.*
covenants for, *ib.*
to shares, 428.
comparison of, to real and personal estate, *ib.*
to goods *bonâ fide* acquired, 54, 412.
deeds, 9, 11.
solicitor's lien on, 30.
TOMBSTONE, 13.
TORT, action for, 69.
TRADE, contracts in restraint of, 97.
marks, 267.
bankruptcy of partners in, 326.
liability of executor carrying on, 328.
customs of, 416.
TRADER, who is, within the bankrupt laws, 139.
TRADES Union Act, 1871..98, 242.
TRANSFER of stock, 211.
TRESPASS in pursuit of game, 21.
on the case, 23.
TROVER and conversion, 23, 26, 45, 51.
recovery in, 45.
TRUST, though voluntary, enforced in equity, 35.
settlements by means of, 273.
funds, act for better securing, 308.
for payment of creditors, when revocable, 313.
for wife's separate use, 399, 400.
gift for "sole use," 400.
form of, of stock, 438.
none entered on ship's register, 59.
TRUSTEE Act, 1850..304.
TRUSTEE in bankruptcy, 55, 149.
appointment of, 149.
security to be given, *ib.*
power to deal with property, 150, 151, 152.
if a solicitor, may be paid for services, 152.
under a liquidation, 171.
TRUSTEES, former liability of, not investing in consols, 210.
transfer of stock, refusal of Bank to recognize, 211.
infant, 214, 305.

TRUSTEES, power to appoint new, 302, 303, 305.
stamp duty on appointment of, 304.
bankruptcy of trustee, 305.
costs of, *ib.*
responsibilities of, *ib.*
indemnity and reimbursement of, 307.
act for relief of, 308.
county courts, jurisdiction of, *ib.*
punishment for fraudulent, 309.
power to apply for opinion of judge, *ib.*
of personal estate made joint owners, 316.
notice to, on assignment of chose in action, 425.
inquiry of, as to prior assignments of choses in action, *ib.*
form of usual clauses in settlement as to, 417.

U.

UMPIRE, 203, 204.
UNCERTIFICATED bankrupt, 166, 167.
UNCLAIMED dividends, 423.
UNLAWFUL contracts, 78, 94, 95.
USE, conveyance by way of, 11.
USURIOUS contracts, 100.

V.

VENDOR'S lien, 43.
VESTED interests, 273.
the courts lean to, 290.
giving, to children by settlement, 291.
VESTING of shares of joint owners, 316.
VOLUNTARY trust enforced, 35.
bonds and covenants, 117.
preference in bankruptcy, 176.
settlement, void as against creditors, 161, 162, 311.
binding on settlor, 312.
of personal estate not void as against subsequent purchasers, 313.

W.

WAGERS void, 99.
WAGES to servants of bankrupt, 163.
of married woman, 389.
WALES, custom of, 334, 377.
WARRANT of attorney, 105.
to secure annuity, 106.
execution and attestation of, 107.

WARRANT of attorney, to be filed within twenty-one days, 108.
in case of bankruptcy, 178.
WARRANTY on sale of goods, 416.
WASTE, tenant without impeachment of, 19.
being impleaded of, *ib.*
by incumbent, 72.
WIDOW, usually preferred in grant of administration, 369.
her share under the Statute of Distribution, 374.
when deprived of her distributive share by settlement, 385.
WIDOWHOOD, gift to a woman during, 382.
WIFE, executrix, 342.
covenant to settle her future property, 309.
no duty on legacy to, 356.
a feme covert, 386.
her chattels personal belong to her husband, *ib.*
exceptions under the Married Women's Property Act, 1870; 387, 389, 390.
her paraphernalia, 387.
her legal choses in action, 390.
her equitable choses in action, 392.
her equity to a settlement, *ib.*
disposition of her reversionary interests, 395, 396.
her husband's liability to her debts, 397, 403.
exception as to marriages after 9th August, 1870; 398.
wife's necessaries, *ib.*
liability to maintain husband and children, *ib.*
her will of her personal estate, 399.
trusts for her separate use, 399, 400.
restraint on her anticipation, 401.
powers may be exercised by, 283.
powers of appointment given to, 402.
separation of, 403, 407.
settlement on, 408.
protection when deserted by her husband, 406.
her alimony, 407.
a *feme sole*, *ib.*
remarks on the law of husband and wife, 409.
acknowledgment by, on conveyance of real estate, 410.
See also MARRIED WOMAN.
WILL, 334.
attestation of, 335, 336.
revocation of, 338.
domicile, *ib.*
executor of, 341.
probate of, 345.
ecclesiastical jurisdiction over, 346.
registration of, in court of probate, *ib.*

WILL of wife by husband's authority, 399.
WINDING-UP Acts, 227, 237.
WITNESSES, examination of, by arbitrators, 195.
to a will, 336.
WRIT of mandamus, 67.
of injunction, *ib.*
of *fieri facias*, 53.
of *levari facias*, 54.
of *elegit*, *ib.*
of *capias ad satisfaciendum*, 109.
WRITING, what contracts to be in, 37, 39, 41, 83, 84, 85, 87, 89.

Y.

YEAR, agreement not to be performed within a, 42, 85.
of executor, 354.
of administrator, 370.
YORK, custom of province of, 334, 346, 377.
YOUNGER children, 286.

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PRINTED BY C. ROWORTH AND SONS,
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